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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AND H. E. GILBERT, *Petitioners,*

v.

BANGOR & AROOSTOOK RAILROAD COMPANY, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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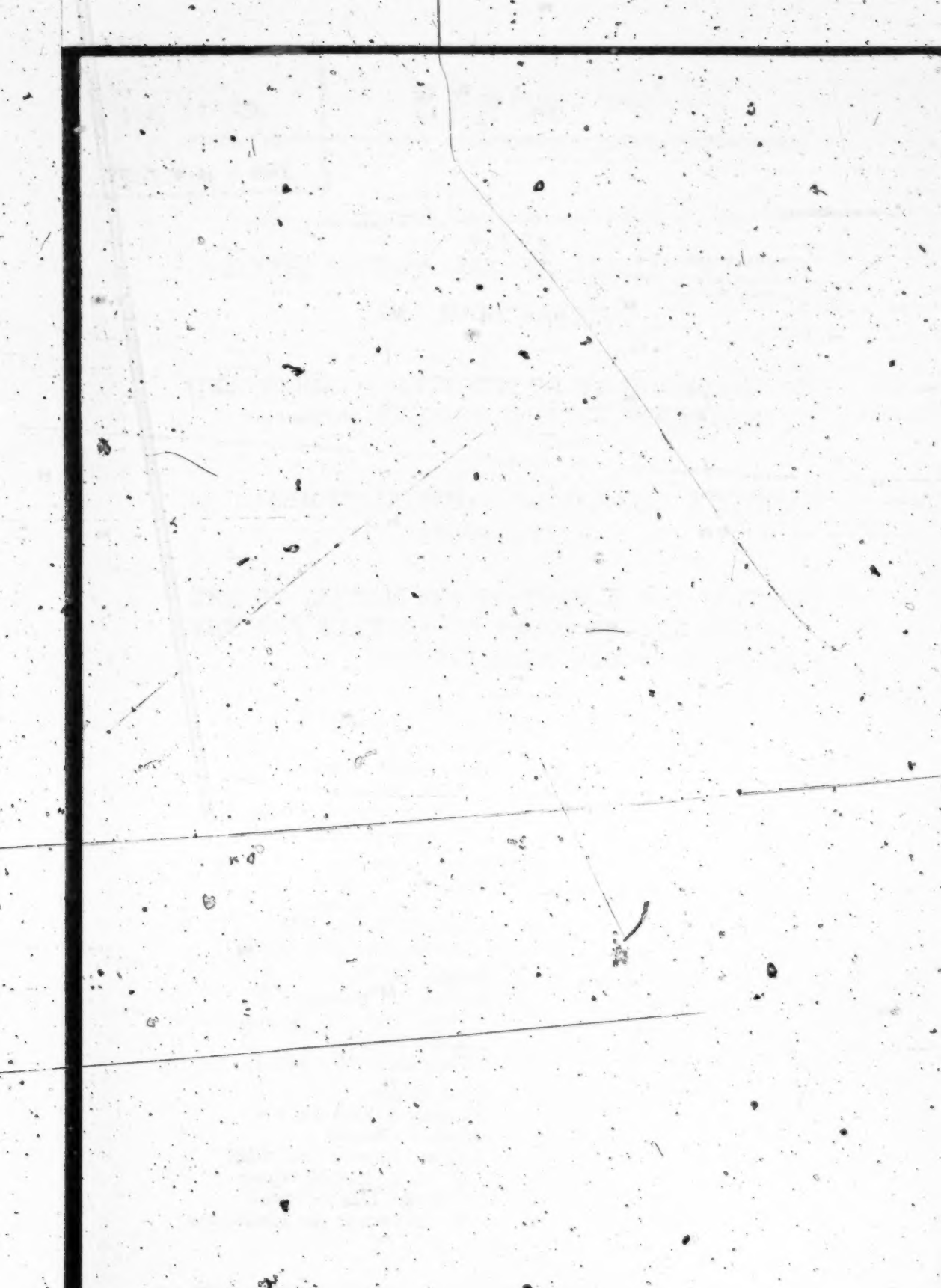

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered herein on May 12, 1967.

Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit issued on May 12, 1967, is not yet reported and is set forth in Appendix A at pp. 35 to 56. The judgment is set forth at p. 57.

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit were entered on May 12, 1967 and the time for the filing of this petition was extended by Chief Justice Warren for an additional 30 days to and including July 11, 1967.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Does 18 U.S.C. § 3692 afford defendants the right to trial by jury in coercive and criminal contempt proceedings predicated on anti-strike injunctions issued by a federal court?

2. After stating to the press under a cloak of anonymity that his injunction had been violated, is a District Judge disqualified by virtue of 28 U.S.C. § 144 from trying the contempt defendants?

3. Do the limitations of the Norris-LaGuardia Act govern federal anti-strike temporary restraining orders in a suit alleging that the strike violates the "major disputes" procedures of the Railway Labor Act?

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[1] Since July 11, 1967 is well within the normal 90-day period for a petition for certiorari, the question might occur why it was necessary to obtain an extension of time. This is a contempt case in which fines were imposed upon petitioners, and if, as petitioners contend, these were criminal contempt fines, the time within which to file the petition might be regulated by the 30-day provision of Rule 22(2) rather than the 90-day period. The question whether the fines were imposed in criminal or civil contempt has relevance to the jury trial issue and to other points raised herein. See pp. 18 to 21, n. 18, *infra*.

Statement of Facts[2]

1. *The 1963 Public Law*

This case arises in the wake of an unprecedented emergency Act of Congress in 1963 requiring compulsory arbitration of a labor dispute in the railroad industry. The origins of that law lie in the long-smoldering "firemen controversy."[3]

In May of 1950 the BLF&E and the railroads concluded the National Diesel Agreement which, building on earlier agreements, provided in essence that a fireman should be employed on every locomotive. In November 1959 the railroads served a bargaining notice on the BLF&E proposing elimination of this requirement in favor of an agreement under which no firemen would be required in freight or yard service except as management in its discretion chose to use them. However, after a succession of mediation steps, including the participation of the Secretary of Labor, a Presidential Railroad Commission and an Emergency Board, the dispute remained unresolved. The railroads then announced that in July 1963 they would unilaterally change existing work rules governing the use of firemen, and the unions responded that they would, in that event, invoke a nationwide strike. On July 22, 1963, President Kennedy sent a special message to Congress proposing legislation to arbitrate the dispute on a temporary two-year basis.

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[2] The relevant statutes are set forth in Appendix B, *infra*, pp. 58-59.

[3] Additional background concerning this controversy is contained in the records in *Brotherhood of Loc. Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963); *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & O. R. Co.*, 377 U.S. 918 (1964); and *Brotherhood of Loc. Engineers* v. *Chicago, Rock Island & P. R. Co.*, 382 U.S. 423 (1966). Because of the unavoidable length of this Statement of Facts, we have not expanded on that background here.

On August 28, 1963 Congress enacted Public Law 88-108, 77 Stat. 132, 45 U.S.C. following § 157, basically adopting President Kennedy's proposal. The law established an Arbitration Board to make a binding resolution of the manning dispute through an award which "shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." The Award of Arbitration Board 282 established under the statute, which issued on November 25, 1963, was to expire by agreement of the parties at 12:01 a.m. on March 31, 1966, and it did so expire. Prior to expiration, however, both the railroads and the BLF&E filed federal District Court suits to construe the effect of the Public Law and the Award on working rights after March 31, 1966. The Court of Appeals below has reviewed those "merits" issues in a companion opinion announced on the same day as its opinion in the present case (*Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt Railroad Company,* 65 L.R.R.M. 2229). The Court of Appeals requested proposed judgments from the parties in that case, and the Court's judgment had not issued as of the time of the preparation of this petition for certiorari to review the decision below in this contempt proceeding.

2. *The Railroads' Refusal To Bargain*

On November 15, 1965, four and a half months before the Arbitration Award was due to expire, the BLF&E served notices upon the railroads seeking to bargain about the fireman manning requirements applicable upon its expiration (Notices Nos. 1 and 2) and upon an independent issue of long concern—a training program for firemen (Notice No. 3). While Congress was deliberating on the Public Law, the railroads' representative had re-

peatedly assured the Congressional committees that during the two-year award period the railroads would negotiate with the BLF&E in an effort finally to settle the dispute. The railroads, however, refused to bargain with the BLF&E on any of its three separate 1965 bargaining notices, thus violating the statutory rights of the Union, as the Court of Appeals has found in its companion decision on the merits (65 L.R.R.M. 2229, 2235-38). Instead of seeking negotiated resolution of the fireman manning dispute, the railroads staked their hopes on obtaining a judicial injunction against the strike which their refusal to negotiate was calculated to provoke. Though *they* were violating their statutory duty to bargain with the Union, the railroads prepared a District Court injunction application on the ground that the Union could not strike until bargaining and mediation had been undertaken and completed (JA 14-31).[4]

3. *Railroads Maneuver for an Injunction*

Prior to the expiration of the Award, the railroads, on January 19, 1966, filed suit in the United States District Court for the District of Columbia for a judgment declaring their rights under the Arbitration Award upon its termination. *Akron & Barberton Belt Railroad Company* v. *Brotherhood of Railroad Trainmen*, Civil Action No. 142-66 (hereinafter the *Akron* case). This suit was filed only against the Brotherhoods involved in the "crew consist" issue; the firemen and their Union are not involved in the crew consist issue, were not named as parties, and did not participate in the *Akron* case.[5]

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[4] "JA" references are to the Joint Appendix in the court below, nine copies of which are being filed with this petition for certiorari.

[5] There are two categories of operating employees in the railroad industry: "engine service" employees and "train service" employees. They are represented by different unions; "engine service" employees by the BLF&E and by the Brotherhood of Locomotive Engineers; "train service"

On February 17, 1966 the BLF&E filed a class action in the United States District Court for the Northern District of Illinois against the railroads, asking that the Court declare that the Arbitration Award "has no force and effect after 12:01 A.M., March 31" and that the provisions of the National Diesel Agreement of 1950 would again be in effect upon expiration of the Award. While the BLF&E case was pending in Illinois, Judge Holtzoff heard oral argument in the *Akron* "crew consist" case in Washington on February 24. When Judge Holtzoff questioned counsel for the Brotherhood of Railroad Trainmen about "firemen", counsel said he did not represent them, that the "firemen" issue was pending in a case in Chicago, that the firemen question "isn't in issue here". Judge Holtzoff, however, indicated from the bench that he would rule for the railroads on both the crew consist and firemen issues (JA 11), and he soon did so in his opinion of March 3, 1966 without any appearance or argument by the firemen.[6]

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employees by the Order of Railway Conductors and Brakemen, the Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America. When on November 2, 1959 the railroads proposed the abrogation of their contracts with the BLF&E concerning the manning of engines, they also proposed far reaching changes to the "train service" unions concerning the composition or "consist" of train crews. Both disputes followed parallel courses in the negotiations. Both were referred by Congress in Public Law 88-108 to the Arbitration Board. There the two disputes were separated because of the different parties involved, the different history of collective bargaining agreements, and the difference in the nature of the work performed.

[6] In that opinion, Judge Holtzoff dealt as much or more with the status and rights of the absent firemen as with the crew consist issue involving the parties before him (JA 13). In justifying his position that the Arbitration Award would continue in effect, Judge Holtzoff said that otherwise, "The vested rights of an unknown number of employees, probably large, would be immediately destroyed. *This is particularly true of the firemen . . .*" Again, Judge Holtzoff construed the termination of the Award to mean that: "No further steps may be taken under the award by either side after its termination date. Thus the *railroads may not discharge any more firemen . . .*" (JA 13). He also ruled that "The carrier may not change rates of pay, rules, or working

On February 28, four days after the oral argument in Washington during which Judge Holtzoff made clear he would rule against the firemen, the railroads moved to transfer the BLF&E's Chicago suit to the District of Columbia for consolidation with the *Akron* case pending before Judge Holtzoff (JA 7-8). The BLF&E opposed the transfer motion because in Washington the case would be assigned to Judge Holtzoff who had ruled in the railroads' favor in a case in which the BLF&E was not joined as a party, had no opportunity to be heard, and after the judge was informed of the pendency of the Chicago action (JA 9). But the District Court in Illinois transferred the suit and on March 24 it was docketed in the District of Columbia (Civil Action No. 784-66). On the same day, the railroads filed their own action in the District of Columbia against the BLF&E (*Bangor and Aroostook Railroad Co.* v. *Brotherhood of Locomotive Firemen and Enginemen*, Civil Action No. 777-66) and prepared to enjoin the strike they expected when the Award expired on March 31, 1966.[7]

4. *The Temporary Restraining Order of March 28, 1966*

On Monday morning of March 28, 1966, the railroads applied to Judge Holtzoff for an anti-strike temporary restraining order in the *Bangor* case on the ground that

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conditions, including size of train crews, *employment of firemen*, etc., and, on the other hand, the employees may not call a strike or use other coercive measures in order to enforce their demands" (JA 13). Judge Holtzoff thus adjudicated the rights of the firemen while they were not a party to the case. Thereafter he applied his March 3 rulings when the BLF&E was subsequently before him (JA 67), (emphasis supplied).

[7] The railroads made no motion to consolidate the transferred case with *Akron* despite their representations in Chicago; rather they simply moved to consolidate the transferred case with their new Washington case. These consolidated cases and the *Akron* case were ultimately heard and decided together in the Court of Appeals in the companion case to this contempt action. *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt Railroad Company*, 65 L.R.R.M. 2229.

the procedures of the Railway Labor Act had not been exhausted (JA. 14, 31). Counsel for the BLF&E, who had been given no formal notice, appeared and requested that "this matter be put over until 1:45 this afternoon, for two reasons: First, I was myself called from a meeting to which I had been summoned by the Attorney General; and second, co-counsel [regular counsel for BLF&E] is on an airplane flying in from Chicago" (JA 32). Judge Holtzoff denied this request, stating that "Ordinarily applications for temporary restraining orders are ex parte and ordinarily we don't grant continuances" (JA 34). Counsel for the BLF&E then moved orally that Judge Holtzoff "send this case to another judge". He began to explain that "It is the feeling of my client that your action on March 3rd in deciding questions affecting the Firemen, when they were not a party to the case . . ." But Judge Holtzoff interrupted, summarily denied the motion and refused to hear any explanation because "You are not entitled to be heard at all on an ex parte application for restraining order" (JA 34).[8]

Judge Holtzoff refused to hear or determine any of the merits of the controversy (JA 34b). And without hearing evidence or finding probable violation of the Railway Labor Act, he forthwith issued a temporary restraining order against any strike over "the agreements, rules, regulations, interpretations, or practices to be applied by plaintiffs [railroads] . . . upon the expiration of the period during which the Award by Arbitration Board No. 282 shall continue in force as an award" (JA 43). The BLF&E im-

[8] Had the Judge permitted it, counsel for the BLF&E would have explained that the basic issues in the case involved the very life or death of the Union; that the firemen were deeply concerned and resentful of the assignment of the case to a judge who had already ruled on the issues against them in their absence; and that therefore it was important that justice be done, but doubly important that the appearance of justice be maintained (JA 149-153).

mediately appealed and moved the Court of Appeals to stay the temporary restraining order; on March 30, 1966, the Court of Appeals dismissed the appeal (JA 44).

5. *The Strike on March 31, 1966 and the Supplemental Temporary Restraining Order*

On Thursday, March 31, 1966 the BLF&E went on strike against eight railroads which had refused to bargain about the BLF&E firemen-training program (Notice No. 3). On the same day the railroads moved for "a supplement to the temporary restraining order" of March 28 to enjoin the ongoing strike (JA 45). The railroads' March 31 affidavits conceded (JA 46, 48, 51) that the BLF&E had informed the railroads that the strike was over the refusal of the carriers to bargain concerning "Notice No. 3" (the training program for firemen) and was not directed to the manning issue covered by the March 28 restraining order. But the railroad affidavits argued that "it is apparent from the timing alone that such [the training program] is not the real purpose of the strikes" (JA 46, 48, 52). In addition, there were railroad affidavits that scattered pickets had said the strike was "because we want our jobs back" (JA 54-56).

At oral argument before Judge Holtzoff on March 31, 1966 on the railroads' motion for a supplemental temporary restraining order to enjoin the ongoing strike, BLF&E counsel argued that the strike *was* actually a strike over the "apprenticeship program" (JA 70, 71, 75). He asked for opportunity to present testimony on this point, or at least to cross-examine the railroads' affiants who were then present in court (JA 65, 73, 76). BLF&E counsel also contended that the strike was a lawful one, the requisite procedures of the Railway Labor Act having been exhausted (JA 67). The BLF&E further contended that the rail-

roads' motion in effect asked for an adjudication that the Union had violated the restraining order of March 28 and was thus in contempt (JA 65). For this reason, too, the BLF&E asked for a hearing on the facts before another summary order was entered.

Judge Holtzoff, however, refused to hear evidence on the disputed issues or to decide them. Instead, he issued a "Supplement" to his order of March 28, directing the BLF&E to end the ongoing strike because the "affidavits sufficiently demonstrate that the said strikes *may relate* to a dispute as to . . . [matters contained in] the Award of Arbitration Board No. 282" (JA 77, emphasis supplied). The BLF&E's immediate appeal from the supplementary temporary restraining order was dismissed by the Court of Appeals on Friday, April 1, 1966, Chief Judge Bazelon dissenting (JA 79).

6. *The Coercive Contempt Order of April 2, 1966*

On Saturday, April 2, 1966 the railroads filed a motion for a rule to show cause why the BLF&E should not be cited for contempt for failure to call off the ongoing strike (JA 80). The railroads sought a "coercive fine" for the purpose of compelling compliance with the restraining order (JA 82). An hour or two later that morning there was oral argument on the motion to show cause (JA 87). The BLF&E requested Judge Holtzoff to "send this matter of contempt to another Judge", because "the Union deeply feels that you cannot be fair to them" (JA 88). The Judge summarily denied this motion and refused to allow counsel to state on the record even "the reasons why the Union feels this . . ." (JA 88). Judge Holtzoff immediately signed the rule to show cause and made it returnable at two o'clock in the afternoon (JA 85); he denied the

BLF&E's motion that the contempt charge be tried by a jury under 18 U.S.C. § 3692 (JA 89).

The coercive contempt "trial" began at 2 o'clock upon the BLF&E's oral return to the show cause order asserting that "we have committed . . . [no] contempt whatever, in any way, of any order of this Court, and secondly, that the outstanding order of this Court is invalid" (JA 94). Judge Holtzoff rejected as irrelevant the BLF&E's specific proffers of proof that (1) the strike was a legal one under the Railway Labor Act; (2) the railroads had at all times refused to bargain with the Union, thereby precluding injunctive relief in view of Section 8 of the Norris-LaGuardia Act; and (3) the BLF&E had made every effort to comply with the order by its offer to the railroads of an orderly return of the firemen to work under the customary conditions in such circumstances of no retaliation against the strikers and no suits against the BLF&E (JA 105, 106-7, 127). Judge Holtzoff refused to allow petitioners to present testimony or to cross-examine the railroads' witnesses on any of these points, because "there is a duty to obey an order of the Court, irrespective of . . . its validity" (JA 102). The Court limited the "trial" to evidence by the railroads that the strike was still on (JA 115, 120, 124).

The Court forthwith found the BLF&E and its President, petitioners herein, guilty of "civil contempt" and imposed "coercive sanctions to compel compliance" (JA 133-134). The contempt judgment ordered that the BLF&E "be fined in the sum of $25,000 and H. E. Gilbert be fined in the sum of $2,500 if the said contempts have not terminated by 12 o'clock noon, on [Sunday] April 3" (JA 140). It was further ordered that like fines be imposed "for each 24 hour period or portion thereof subsequent to twelve o'clock noon on April 3, 1966, during which the said contempts have not terminated" (JA 140). Later on Satur-

day, April 2, 1966, the BLF&E appealed and filed in the Court of Appeals a motion to stay the order adjudging petitioners in contempt. On Sunday, April 3, the Court of Appeals dismissed the appeal (JA 140-141).

7. *The Railroads' Motion to Increase Fines and the Termination of the Strike*

On Sunday, April 3, 1966 the railroads requested Judge Holtzoff to issue an order requiring the BLF&E and President Gilbert to show cause why the fines imposed by the contempt order of April 2 should not be increased to $500,000 per day for the Union, and $10,000 per day for President Gilbert (JA 143). A rule to show cause was forthwith issued directing the BLF&E and President Gilbert to show cause on Monday morning why the fines should not be increased "from this day forward" (JA 146). The rule was without prejudice to the railroads' right to seek compensatory fines "as a result of violation of this Court's orders" (JA 145-146).

At oral argument on Monday, April 4, counsel for the railroads announced that he was "happy to inform Your Honor that the men are back to work on the ten railroads, and, in the light of that, as this contempt proceeding was for the purpose of coercion rather than compensation, I see no occasion to press the issue which was to be brought on this morning" (JA 146-147). He then moved that the rule to show cause be vacated (JA 146-147), and an order to that effect was subsequently issued (JA 148-149).

8. *The Events Leading Up to the Contempt Conviction*

On Monday, April 4, 1966, Judge Holtzoff, *under a cloak of anonymity*, "informed the press that fines had accrued automatically because the union remained on strike for about 12 hours after the deadline . . . noon Sunday" (JA

152). On Wednesday, April 6, when counsel for the railroads appeared before Judge Holtzoff on an ex parte matter without counsel for petitioners, the Judge stated to him that "one day's fine accrued under the contempt order", and "the Court can't handle those matters sua sponte. It must be initiated by counsel, I presume either counsel for the plaintiffs or, in view of the fact that the fines accrued to the Government, by the Secretary of Labor. . . ." Counsel for the railroads pointed out that the matter then under consideration "does not relate at all to that", and the Judge replied, "Yes, there is nothing before the Court. . . . The Court only takes those matters up when presented by counsel for the party that has rights in the matter" (JA 148).

On April 22, 1966 the BLF&E, having learned of and confirmed these events, filed a motion and affidavit pursuant to 28 U.S.C. § 144 for the disqualification of Judge Holtzoff from further participation in the proceedings (JA 149). The affidavit of petitioner Gilbert set forth Judge Holtzoff's April 4 statements to the press "under the restriction that the press not quote Judge Holtzoff directly, but only refer to a court official or officials . . ." to the effect that contempt fines were due and payable because the Union had remained on strike after the April 3 deadline (JA 152).[9] It also recited Judge Holtzoff's prompting of the railroads on April 6, 1966 to force payment of the fines (JA 152). This disqualification motion was denied by Judge Holtzoff without argument the day it was filed, when

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[9] "On information and belief, on April 4, 1966, Judge Holtzoff informed the press that fines had accrued automatically because the union remained on strike for about 12 hours after the deadline. Judge Holtzoff said that fines of $27,500 were now due and payable because the strike did not end by noon Sunday. Said statements to the press were made under the restriction that the press not quote Judge Holtzoff directly, but only refer to a court official or officials as the source of said statements" (JA 152).

counsel for BLF&E appeared before him on other matters (JA 154).

On April 29, 1966 the railroads moved for an order "assessing fines for failure to terminate contempts" by 12 o'clock noon on April 3, 1966 (JA 155). In addition the railroads asked for an order awarding them compensatory damages for contempt (JA 160). Attached affidavits by the railroads conceded that BLF&E officials had been instructed by Union President Gilbert on April 2, to "reach an agreement to terminate the strike" (JA 165), but averred that the strike had not actually terminated until late April 3 or early April 4 (JA 157).

On May 6, the BLF&E filed its opposition to the railroads' motion to assess fines, raising therein issues of both law and fact (JA 191). Among other things, the BLF&E maintained that it had complied with the order to the best of its ability, that the strike was a lawful one under the Railway Labor Act, that the Court had no jurisdiction under Norris-LaGuardia to issue the order allegedly violated, that the railroads had no standing to initiate the contempt proceedings, and that the BLF&E was entitled to a jury trial (JA 191-193).

9. *The Sudden Contempt Conviction on June 9, 1966*

The District Court set the pending motions for fines and compensatory damages for trial on June 17 (JA 207). The railroads moved to continue the trial date and counsel for both parties appeared before Judge Holtzoff on June 9 upon the motion for continuance (JA 207). The railroads urged a postponement to the fall of 1966 because of the factual issues raised and the need for "considerable discovery" (JA 197). Thereupon, despite the fact that all that was before him was a motion to postpone the June 17 trial date, Judge Holtzoff suddenly issued a verdict of

"guilty" (JA 199-201) and imposed unconditional fines on petitioners who were not personally in court (JA 207):

> "Now, then, each of the orders of the Court, the one granting the injunction and the contempt order, were affirmed by the Court of Appeals. That being so, the issues as to the legality of the order or the regularity of the proceedings are no longer open in this Court. In fact, if the Court wanted to reopen them I think the Court would lack the power . . . to reconsider the matter after the appellate court has reviewed and affirmed the action of the trial court . . .
>
> "Now that being so, the entry of the judgment for the fine is a purely ministerial act.
>
> "Accordingly, the Court will now enter judgment for the two fines for the one day and counsel for the plaintiffs may submit an appropriate judgment . . ." (JA 201).

Counsel for the BLF&E objected without success to the act of finding guilt and imposing punishment on a motion to postpone the trial.[10] But Judge Holtzoff persisted, and

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[10] "Mr. Rauh: If Your Honor please, I know I am not allowed to argue, but something happened here that has taken me greatly by surprise. We did not come before Your Honor on the question of the fine, we came before Your Honor on the question whether there would be a trial of that matter next Friday.

"The Court: There is nothing to try. The plaintiffs' motion annexes affidavits showing that the strike continued for a part of one day beyond Sunday noon . . .

Mr. Rauh: But I would like to put on the record an offer of proof, that the Brotherhood substantially complied with the order of the Court . . . I respectfully suggest we are entitled to a trial on the question whether we did in fact make such an order, because we did in fact, right after twelve o'clock that day, send a telegram from Cleveland to the different places, ordering them to call off the strike . . .

"The Court: There is no issue to try, Mr. Rauh, because the picket lines were still on for almost twelve hours after Sunday noon . . ." (JA 202-203).

on June 15 entered a written order imposing on petitioners fines of $25,000 and $2,500 respectively for a "contempt" he adjudicated without benefit of notice, hearing, trial, or even the presence of the defendants (JA 206-8).

10. *Proceedings in the Court Below*

The decision below remands for hearing the proceedings to assess contempt fines, finding violation of petitioners' right to due process on June 9, 1966, when the District Court imposed unconditional fines upon them. But the Court of Appeals has flatly rejected petitioners' arguments asserting (i) the right to trial by jury in the District Court's imposition of both coercive and then of unconditional contempt fines, (ii) the error of the trial judge in refusing to honor the motion to disqualify for bias and prejudice, and (iii) the illegality of the temporary restraining orders under the Norris-LaGuardia Act. What the court below has thus done is to remand for trial before a biased District Judge without a jury a contempt charge based on anti-strike restraining orders issued and enforced wthout hearing or even the slightest nod to the procedural and substantive restrictions of the Norris-LaGuardia Act. The total effect of the rulings against petitioners by the Court of Appeals is to leave nothing of the protections Congress so advisedly enacted in 1932 against rule by federal injunction in labor relations.

Reasons for Granting the Writ

The Court of Appeals has set aside the contempt fines imposed upon petitioners, but, as just pointed out, it has remanded an anti-strike contempt proceeding for trial without a jury before a biased judge. We bottom our case for certiorari at this stage of the proceedings upon the dual grounds that (1) the jury trial question pending on grant of

certiorari in *International Longshoremen's Association* v. *Philadelphia Marine Trade Association*, No. 78, October Term, 1967, is presented even more sharply in this case and (2) an important question in the administration of federal justice is presented concerning trial judge disqualification under 28 U.S.C. § 144 (*infra*, pp. 18 to 24). Similar questions of appropriate judge and right to jury have often been reviewed by this Court, on mandamus and certiorari, prior to any District Court trial in order to safeguard the defendant against the burdens of proceeding before an improper or inadequate tribunal.[11] The interests of justice require that petitioners who have *already* been in litigation for well over a year not suffer yet another tainted trial without a jury and before a disqualified judge.

Beyond these procedural issues ripe for and needful of present resolution, we also urge a third and possibly the most important issue for review: in holding the restraining order prohibitions of Norris-LaGuardia wholly inapplicable to Railway Labor Act litigation, the decision below conflicts with repeated rulings of this Court upholding the historic ban on anti-strike injunctions (*infra*, pp. 25 to 33). This issue is perhaps less needful of present resolution in its impact upon petitioners than the procedures to govern judge and jury at the forthcoming trial; indeed, it is not an issue we would have pressed independently upon this Court at this juncture. But in its immediate public implications the Norris-LaGuardia nullification below may be even more compelling than the issues of jury and judge. Since the jury issue presented here is surely worthy of

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[11] *In re Simons*, 247 U.S. 231; *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701; *In re Peterson*, 253 U.S. 300; *U.S. Alkali Assn.* v. *United States*, 325 U.S. 196; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249. See also *Texaco, Inc.* v. *Chandler*, 354 F. 2d 655, cert. denied, 383 U.S. 936; *Rapp* v. *Van Dusen*,, 350 F. 2d 806; *Occidental Petroleum Corp.* v. *Chandler*, 303 F. 2d 55; *In re Union Leader Corp.*, 292 F. 2d 381, cert. denied, 368 U.S. 927; *United States* v. *Ritter*, 273 F. 2d 30, cert. denied, 362 U.S. 946.

coincident consideration with the review of the same question in No. 78, and since the supervisory power of this Court is directly invoked by the ruling below denying bias disqualification, we tender for concurrent review the fundamental Norris-LaGuardia issue which the court below has resolved in direct conflict with this Court's rulings.

I

THE JURY TRIAL QUESTION PENDING ON GRANT OF CERTIORARI IN NO. 78 IS PRESENTED EVEN MORE SHARPLY IN THIS CASE.

This Court has before it on grant of certiorari in *International Longshoremen's Association* v. *Philadelphia Marine Trade Association*, No. 78, October Term, 1967, the question whether a District Court erred in refusing a jury trial under 18 U.S.C. § 3692 in imposing a coercive contempt fine upon a union to compel its cessation of a strike. There, the Third Circuit (368 F. 2d 932, 934) rationalized the denial of a jury with the express requirement of 18 U.S.C. § 3692 (*infra*, p. 58) on the ground that Congress in 1948 transferred this Norris-LaGuardia guarantee to "a part of the criminal code". The District of Columbia Circuit in the present case has adopted the same rationale in holding to the same effect (see *infra*, p. 48) and has refused to find the statute's jury trial requirement applicable in the coercive contempt trial held on April 2, 1966.

In the face of the unequivocal statutory guarantee ("all cases of contempt"), the clear legislative history,[12] and this

[12] Not only are the statutory words unambiguous, but the legislative history also shows conclusively that the statute *was* meant to cover coercive contempt cases. The Senate bill provided for a jury trial in all cases of contempt whether or not they arose out of labor disputes. The House bill was much more limited; it covered only criminal contempts and only when

Court's previous observation that in labor dispute contempt cases jury trial is fully available,[12] the rulings of the Third Circuit and of the court below denying jury trial in labor dispute coercive contempt cases manifestly raise a vital federal question; its importance is demonstrated by the grant of review thereon in No. 78. Concurrent review of the present case will assist in the Court's disposition of the jury question because certain additional considerations presented here add sharp illumination to that issue.

As in No. 78, the District Court below denied a jury in the *coercive* contempt hearing on April 2, 1966 wherein it imposed a conditional fine for each future day of the ongoing strike, and the Court of Appeals has affirmed its action. But here the District Court *also* rejected the plea for a jury trial in the now remanded *punitive* contempt

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they arose out of labor disputes. The two bills went to conference and Senator Norris later explained to the Senate:

> "The Senate also, in that [conference] compromise, succeeded in striking the word 'criminal' out of the House section. Under the House bill, before a man would be entitled to a jury trial on a charge of contempt, it would first have to appear that it was a criminal contempt. Under the Senate bill it could be either civil or criminal. Under the compromise made, the language of the Senate was agreed to, so that now anyone charged with any kind of a contempt arising under any of the provisions of this Act will be entitled to a jury trial in the contempt proceedings." 75 Cong. Rec. 6453.

The same explanation was given to the House:

> "*Mr. Dyer:* the only thing we had in controversy and only other change of consequence . . . was in reference to contempts. The House provision provided for criminal contempts, that there should be a jury trial in such cases. We struck out the word 'criminal', and a jury trial is now in order for contempt, civil or criminal." 75 Cong. Rec. 6337.

[12] "We believe, and the Government admits, that the defendants would have been entitled to a jury trial if § 11 applied to the instant contempt proceeding and if this case arose under the Norris-LaGuardia Act." *United States* v. *United Mine Workers*, 330 U.S. 258, 298, n. 69.

proceeding held on June 9, 1966; the Court of Appeals has approved that denial as well by treating the unconditional imposition of fines as civil rather than criminal. Thus, the District Court is instructed now to resolve without a jury the question "whether there is indeed" a contempt committed by petitioners after the noon deadline on April 3, 1966 and, if so, to impose unconditional fines for past violations. Compliance has long ago been effected, and the District Court's forthcoming hearing will thus be a criminal contempt trial to determine whether and to what degree petitioners should be punished for "yesterday's contemptuous conduct". *Penfield Co.* v. *Securities & Exchange Commission*, 330 U.S. 585, 594; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 442-443.[14] Yet the court below equally refuses to grant a jury trial in that wholly punitive contempt fine proceeding wherein petitioners have no key of compliance to avoid punishment.[15]

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[14] The courts have generally recognized two discrete categories—coercive contempt and criminal contempt—in what may more properly be treated as three. Once compliance with an injunction has been effected, the act of unconditionally assessing a fine that was previously only conditionally imposed in coercive contempt proceedings is obviously punitive; "for if the contumacy be carried to the point of actual imprisonment or of absolute liability to a fine, it is punished quite as effectively as if subject to these penalties at the outset." Comment, *Civil and Criminal Contempt in the Federal Courts*, 57 Yale L. J. 83, 105 (1947). Thus, even if a post-compliance proceeding for assessment and collection of a conditionally-imposed fine is not treated as criminal for all purposes, its unconditional and punitive characteristics certainly prevent it from being treated as merely civil and it may be useful to recognize this as a third category of contempt. The unconditional and punitive characteristics of this third category render it far closer to criminal than civil contempt and thus bring it within the ambit of Section 3692 even if this Court should reject petitioners' argument that all contempts are covered by the Act.

[15] The statutory construction by the court below also creates a serious issue under *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380. In that case this Court under its supervisory power announced that criminal contempt sentences exceeding certain minimum limits are no longer imposable absent a trial by jury or waiver thereof. The Court made determinative on that question the "petty offense" definition of 18 U.S.C. § 1, which encompasses imprisonment not exceeding six months "or a fine of not more than $500.00".

In the criminal contempt aspect of the present case there is thus even harsher discord with 18 U.S.C. § 3692 in the denial of jury at a trial held long after compliance has been effected, where there can be no possible embarrassment to the judicial process because of any delay caused by a jury determination.[16] This recalls the emphasis of the separate opinion by Justices Black and Douglas in *United States* v. *United Mine Workers*, 330 U.S. 258, 328-335.[17] They there underlined (at p. 332, n. 5) that the jury ("which is thought necessary to pass upon the desert of a defendant to suffer punishment") might not be required where the contempt power is invoked only to secure compliance by conditional penalties, but that where the court is imposing unconditional contempt punishment, "regular process and trial by jury should be required." The Justices thus focused upon the consideration which makes the denial of jury in the present case even more compelling than in No. 78. For here, compliance having long ago been effected, there is not even the "expeditious compliance" rationalization to justify withholding the jury expressly granted by the Congress in its historic 1932 enactment. Thus, even if the jury guarantee should be confined to cases of criminal or punitive contempt, in its remanded post-compliance posture this is just such a case.[18]

The fines in the present case were in the amount of $27,500.00, and would thus appear not to fall within the narrow "petty offense" area this Court has left open for contempt punishment without benefit of jury.

[16] We do not, of course, imply that the inconvenience or delay of jury trial could justify its abridgment. This Court has insisted on preservation of the right in the face of such inconvenience or delay, in recent Declaratory Judgment Act rulings. See *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469; *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500.

[17] See also opinion of Justice Goldberg, the Chief Justice, and Justice Douglas, dissenting in *United States* v. *Barnett*, 376 U.S. 681, 753-755.

[18] This Court may find petitioners entitled to a jury trial (i) because the statute covers coercive no less than criminal contempts or (ii) because the unconditional fines here involved make the pending contempt proceedings criminal. If the Court should adopt the first rationale, thus obviating the need to determine whether the further proceedings are criminal in

II

THE REFUSAL BELOW TO DISQUALIFY JUDGE HOLTZOFF FOR BIAS AND PREJUDICE UNDER 28 U.S.C. § 144 PRESENTS AN IMPORTANT QUESTION IN THE ADMINISTRATION OF FEDERAL JUSTICE.

The court below not only denied petitioners' jury plea; it also ruled that a District Judge is not disqualified to try an alleged contempt of his own injunction though prior to trial he told the press under cloak of anonymity that a violation of his order had been committed and that the defendants were liable for payment of fines for their contempt. That ruling below strips this sensitive federal statute governing District Judge disqualification of its central purpose and effect and requires this Court's intervention to ensure the proper administration of justice. *Cf. Sheppard* v. *Maxwell*, 384 U.S. 333, 361-363.

As the court below admits (*infra*, p. 43), the allegations of the bias affidavit are binding for the purpose of invoking the disqualification procedure of 28 U.S.C. § 144. As thus clearly and conclusively asserted in the affidavit (JA 152), Judge Holtzoff on April 4, 1966

> "informed the press that fines had accrued automatically because the union remained on strike for about 12 hours after the deadline. Judge Holtzoff said that fines of $27,500 were now due and payable because the strike did not end by noon Sunday. Said statements to the press were made under the restriction that the

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nature for purposes of the jury issue, the question would still remain whether the remanded proceedings are civil or criminal. Other procedural aspects of the remanded trial, such as the presumption of innocence and the necessity of proving guilt beyond a reasonable doubt, would be governed by that distinction. We respectfully present and preserve this additional question for resolution in connection with the other procedural incidents of the remanded contempt trial, if the Court should determine the jury issue without resolving the civil-criminal dichotomy.

press not quote Judge Holtzoff directly, but only refer to a court official or officials as the source of said statements."

To petitioners' contention that a judge who has given the press "off the record" his prejudgment of guilt is disqualified for bias and prejudice, the court below answers that this allegation shows "no more than an expression of prior opinion on a legal question" (*infra*, p. 44). Not only does the Court's apologia completely overlook the inherent bias in any anonymous statements to the press, but it is incomprehensible that statements that petitioners "remained on strike for about 12 hours after the deadline" and are thus guilty of contempt could be characterized as a mere expression of opinion on a "legal question". Indeed, the Court's opinion only a few pages later recognizes the very real possibility of "a genuine issue of fact regarding compliance" and, in view of that "contested factual issue," remands for a trial on the questions of contempt and appropriate punishment (*infra*, pp. 51 to 54).

Whether characterized as law or fact, Judge Holtzoff's statements on Monday, April 4, 1966 that defendants had committed contempt by failing to end the strike at noon Sunday, April 3, constituted an expression of his view on the very question which the Court of Appeals has remanded for his evidentiary resolution. But an opinion of defendant's guilt has traditionally disqualified the juror (*Irvin* v. *Dowd*, 366 U.S. 717), and, *a fortiori*, must bar the judge. Yet the Court of Appeals in the same breath orders a new hearing to determine whether defendants failed to call off the strike by noon on April 3, and finds Judge Holtzoff not disqualified by his extra-judicial declaration that the defendants had not complied with his order by the noon deadline. In sum, the Court holds it permissible for a federal judge first to "leak" to the press his conclusion

that the defendants are guilty and then to proceed to try that same factual question in a formal judicial hearing.

The ruling below on the bias issue thus undermines the heart of the disqualification statute and presents an important question in the administration of justice for this Court's supervisory resolution. Cf. *Berger* v. *United States*, 255 U.S. 22, 35-36; *Offutt* v. *United States*, 348 U.S. 11, 15. And the ruling doubly demands review in the wake of *Sheppard* v. *Maxwell*, 384 U.S. 333, 361. For this Court in *Sheppard* directed trial courts to preclude "any lawyer, party, witness, or court official" from public expression "of belief in guilt or innocence". It is inconceivable that the Court could sanction off-the-record assertions to the press of defendants' guilt by a federal District Judge after it has required state judges to preclude just such prejudicial comments by any lawyer, party, witness, or court official.[19]

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[19] It is also noteworthy that in *Sheppard* there was an allegation that the state judge had expressed to a member of the press the opinion that the defendant was "guilty as hell". This Court, however (384 U.S. at 358, n. 11), found the mere failure of the state judge to preclude prejudicial statements to the press by others sufficient error to avoid the need for ruling on the judge's own asserted opinion of guilt. If that should become the rule for state judges, *a fortiori* Judge Holtzoff's anonymous declaration of guilt—published on April 5, 1966 as the statement of a "court official" in The New York Times, Wall Street Journal, and Washington Post—threatens the integrity of federal justice.

III

THE NULLIFICATION OF NORRIS-LAGUARDIA BY THE DECISION BELOW CONFLICTS WITH REPEATED RULINGS OF THIS COURT AND OF OTHER COURTS OF APPEALS.

The court below has struck at the very heart of the Norris-LaGuardia protection against "government by injunction". First, the Court of Appeals declares that Norris-LaGuardia was intended only to apply to diversity litigation (*infra*, p. 50, n. 30), and provides no restriction upon anti-strike injunctions predicated on alleged union violation of such federal statutes as the Railway Labor Act or the National Labor Relations Act. Second, following this sweeping restriction rendering Norris-LaGuardia inapplicable in litigation under other federal labor laws, the court goes even further and holds that no actual union violation of federal law need be found before an anti-strike restraining order may issue to preserve the "status quo". The mere *possibility* that the Union has violated the Railway Labor Act suffices, says the Court, for the issuance of a temporary restraining order (*infra*, p. 56). And it so holds although in its companion "merits" decision it finds not that the *Union* violated the Railway Labor Act, but that the *railroads* did so in refusing to bargain with the BLF&E. 65 L.R.R.M. 2229, 2235-43. The most weighty questions are presented by the dual rationale below that the Railway Labor Act inferentially repealed Norris-LaGuardia's restrictions on anti-strike injunctions in the railway labor field and that such injunctions may now be issued on the mere "possibility", rather than a judicial finding, that the strike violates federal law.[20]

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[20] It should be noted that the rule in *Mine Workers* barring defense against criminal contempt on the ground of invalidity of the underlying

(i) *The implied repeal holding of the court below.* The sweeping thesis of the decision below (*infra*, p. 50, n. 30) is that Norris-LaGuardia provisions "do not limit injunctions provided for by or issued in aid of other federal statutes in the labor relations field, including the Railway Labor Act." This radical curtailment of Norris-LaGuardia is supported by the court below on the ground that "in essence" the statute only "denies jurisdiction to issue the kind of injunction theretofore issued by federal courts in diversity cases on a showing of illegality under common law due to fraud or breach of contract" (*infra*, p. 50, n. 30). By this sleight of hand the court below would wipe out the voluminous history of Norris-LaGuardia concerning federal anti-strike injunctions issued on Sherman Act grounds, and make the statute wholly inapplicable to suits alleging Railway Labor Act or National Labor Relations Act violations.[21]

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injunction is *not* presented in this case; after touching upon that rule, the court below holds that it is "not . . . determinative in the case now before us, because we find that the Norris-LaGuardia Act does not apply to preclude these underlying temporary restraining orders" (*infra*, p. 55). Moreover, this Court in *Mine Workers* explained that in the conditional fine as distinguished from the punitive fine portion of the case, a coercive sanction would not be imposed to enforce an underlying injunction prohibited by the Norris-LaGuardia Act. As the majority opinion put it, if "the Norris-LaGuardia Act applied to this case and prohibited injunctive relief at the request of the United States, we would set aside . . . the judgment for civil [coercive] contempt" (330 U.S. at 295). The decision below rules that the contempt proceedings against petitioners are coercive rather than punitive. Not only did the lower court decline to apply the *Mine Workers* "obedience" rule, but it is clear that it could not have done so consistent with its view that the contempt proceedings against petitioners are coercive rather than punitive in nature. Whatever may be said for the rule *punishing* contemnors for having violated illegal injunctions, we know of no rationale ever suggested for awarding coercive contempt relief to *enforce an illegal injunction.*

[21] It is true, of course, that this Court has on occasion approved the issuance of injunctions in labor disputes against conduct violating the Railway Labor Act, but it has narrowly curtailed the implied exceptions to Norris-LaGuardia. Although the Railway Labor Act was enacted after

Thirty-five years after Norris-LaGuardia, such a radical reinterpretation comes too late. This Court has on numerous occasions rejected curtailment of the statute to diversity cases, and has upheld the applicability of Norris-LaGuardia to labor disputes which may involve a violation of the Sherman Act (*Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U.S. 91, 103), the National Labor Relations Act (*Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195; *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442; cf. *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 429, n. 15), and the Railway Labor Act (*Order of Railroad*

Norris-LaGuardia, the provisions of the earlier statute remain in force and do not yield unless the consequence of giving effect to them is to render "nugatory" a superseding requirement of the Railway Labor Act. *Virginian Railway Co.* v. *System Federation*, 300 U.S. 515, 562-563. The race discrimination cases such as *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774, and *Graham* v. *Brotherhood of Loc. Fire. & Eng.*, 338 U.S. 232, 237-240, invoked affirmative obligations of unions toward employees under the Railway Labor Act far removed from the context of the concern of the Norris-LaGuardia Act with anti-strike injunctions. And this Court's *Chicago River* ruling (353 U.S. 30) in effect found that the Railway Labor Act forbids the self-help of a strike by a union over a minor dispute subject to compulsory arbitration, and thus impliedly exempts injunctions against such illegal strikes from Norris-LaGuardia. Contrasting with such narrow exemptions is the breadth of this Court's application of Norris-LaGuardia to the traditional area of bargaining disputes in the railroad industry. In *Order of Railroad Telegraphers* v. *Chicago & N. W. Ry. Co.*, 362 U.S. 330, this Court held that the Norris-LaGuardia Act barred an injunction against a threatened strike in support of a union demand that the railroad should not abolish jobs without the union's consent. "We hold," stated the Court, "that this case involves or grows out of a labor dispute within the meaning of the Norris-LaGuardia Act and that the District Court was without jurisdiction permanently to enjoin the strike." *Id.* at 335. The Court confined the exceptions to the applicability of the Norris-LaGuardia Act to the specific situations and reasons which had evoked them. *Id.* at 338-39. Similarly in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U.S. 50, this Court (at pp. 58-60) reviewed the legislative history showing that Norris-LaGuardia was intended to blend with provisions of the 1926 Railway Labor Act extended in the 1934 law and that while Norris-LaGuardia was "not limited to railway labor disputes . . . it includes them." In sum, contrary to the ruling below, there is no blanket exemption from the Norris-LaGuardia Act just because the controversy is a railway labor dispute.

Telegraphers v. *Chicago & N.W. Ry. Co.*, 362 U.S. 330; *Brotherhood of Railroad Trainmen* v. *Toledo, P.&W.R. Co.*, 321 U.S. 50). Courts of Appeals have ruled to like effect.[22] The ruling below is thus in direct conflict with this Court's authoritative decisions and circuit court rulings upholding the Norris-LaGuardia ban on anti-strike injunctions issued in aid of employer "rights" under federal labor laws which do not expressly lift the ban.

Moreover, as this very case demonstrates, the inferential repeal of Norris-LaGuardia found by the court below strikes down in blunderbuss fashion a whole range of procedural and substantive protections upon which Congress placed predominant value.

Thus, Judge Holtzoff's temporary restraining orders were clearly in violation of Section 4 of the Act. Certainly the issue between the parties over the BLF&E's bargaining notices and the strike to support its demands therein constituted a "labor dispute." And this Court has emphasized that, in a "major dispute" arising from a bargaining notice, the Norris-LaGuardia Act "has been held [in *Toledo*] to prevent the issuance of an injunction" because

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[22] The Courts of Appeals have emphasized, following *Toledo*, that the Norris-LaGuardia Act "prohibits the issuance of an injunction in a railway labor case involving a 'major dispute' ". *Butte, Anaconda & P. Ry. Co.* v. *Brotherhood of Loc. Fire. & Eng.*, 268 F. 2d 54, 58 (9th Cir. 1959). And they have uniformly recognized the limitations which Norris-LaGuardia imposes upon the power of District Courts to issue injunctions restraining strikes when "major disputes" under the Railway Labor Act are involved. *Brotherhood of Railroad Carmen* v. *Chicago & N.W. Ry. Co.*, 354 F. 2d 786 (8th Cir. 1965); *Missouri-Illinois R. Co.* v. *Order of Railway Conductors*, 322 F. 2d 793 (8th Cir. 1963); *Pullman Company* v. *Order of Railway Conductors & Brakemen*, 316 F. 2d 556 (7th Cir. 1963), cert. denied, 375 U.S. 820 (1963); *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (2nd Cir. 1962). Cf. *Sinclair Refining Company* v. *Atkinson*, 290 F. 2d 312 (7th Cir. 1961), aff'd, 370 U.S. 195 (1962). An opinion of the Third Circuit limiting the application of Norris-LaGuardia in an arbitration matter is the subject of this Court's review on grant of certiorari in *International Longshoremen's Association* v. *Philadelphia Marine Trade Association*, No. 34, October Term, 1967.

in the area of collective bargaining "the Railway Labor Act does not provide a process for a final decision like that of the Adjustment Board in a 'minor dispute' case." *Brotherhood of Railroad Trainmen* v. *Chicago R.&I.R. Co.*, 353 U.S. 30, 42, n. 24.

Equally clearly, Judge Holtzoff's temporary restraining orders violated Section 7 of the Act. That section requires that no temporary or permanent injunction in a labor dispute be issued except after hearing "in open court" the testimony of witnesses subject to cross-examination. No testimony on behalf of the railroads was offered or heard, and, worse yet, the railroads' affiants present in the courtroom were protected against examination by the BLF&E (JA 65, 73, 76). Section 7 also requires that the Court make "findings of fact" that "unlawful acts have been threatened and will be committed unless restrained". No such findings were made (JA 37, 76). Section 7 precludes temporary restraining orders even in emergency situations without hearing for *more than five days*. Yet Judge Holtzoff was enforcing on Saturday and Sunday, April 2 and 3, a temporary restraining order issued on Monday, March 28, 1966, although under the statute that order had become "void at the expiration of said five days." The multiple violation of the guarantees of Section 7 of Norris-LaGuardia is indisputable.[23]

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[23] In *Detroit & Toledo Shore Line R. Co.* v. *Brotherhood of Loc. Fire. & Eng.*, 357 F. 2d 152 (1966), the Court of Appeals for the Sixth Circuit found violation of Section 7 of the Norris-LaGuardia Act and reversed an anti-strike preliminary injunction which had been granted by the District Court without hearing "witnesses in open court". In that case: (1) certain provisions of a prior railroad-union agreement were, in the union's view, automatically reinstated upon the expiration of temporary supervening rules; (2) the railroad's refusal to abide by the terms of the revived agreement forced the union to strike in self-protection; and (3) the railroad reacted to the strike which its conduct had provoked by seeking interim injunctive relief.

The Sixth Circuit sustained the objection "that no hearing was held in

Possibly the worst violation of Norris-LaGuardia by Judge Holtzoff was his disregard of Section 8. That section assures that "no restraining order" shall be granted to a complainant involved in a labor dispute who has failed to comply with any pertinent obligation imposed by law or has failed to "make every reasonable effort to settle such dispute . . . by negotiation. . . ." The court below in its opinion in the "merits" case (65 L.R.R.M. 2229, 2235-43) analyzes at length the conduct of the railroads toward the BLF&E and finds that in the months preceding their application for the temporary restraining orders they violated their clear statutory obligation under the Railway Labor Act by refusing to bargain or negotiate with the BLF&E on its valid bargaining notice. The railroads thus having failed to make "every reasonable effort"—indeed any effort at all—to settle the dispute by negotiation, the "clean hands" requirement of Section 8 was directly transgressed. *Brotherhood of Railroad Trainmen* v. *Toledo, P.&W.R. Co.*, 321 U.S. 50. Although *Toledo* and Section 8 were fully briefed below, the Court of Appeals treated both with equally eloquent silence. The court below never suggests how or why the mere enactment of the Railway Labor Act repealed so time-honored a doctrine as the "clean hands" rule codified by Congress in Section 8 and applied by this Court in *Toledo*.

In sum, the holding below that Section 8 of Norris-

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the District Court prior to the granting of the injunction," and vacated the preliminary injunction. In so doing, the Court relied upon Section 7 of the Norris-LaGuardia Act, and explained (357 F. 2d at 154):

> "This Court is satisfied that a labor dispute existed at the time in question, which distinguishes this case from Brotherhood of Rail. Train. v. New York Cent. R. Co., 6 Cir., 1957, 246 F. 2d 114, 115. Since there was a labor dispute and a controversy over the facts a hearing should have been held, at which time the plaintiff should have been required to offer evidence in support of the allegations set forth in the complaint, and the defendants should have been afforded an opportunity to offer testimony in opposition thereto."

LaGuardia, as well as Sections 4 and 7, were somehow impliedly repealed by the Railway Labor Act, contravenes the whole array of Congressional protections against arbitrary injunctions barring the right to strike. So detailed a charter of protections could hardly have disappeared by implication in the enactment of later labor laws.

(ii) *The "status quo" rationalization.* Possibly an even greater unwarranted restriction of Norris-LaGuardia flows from the ruling below that status quo injunctions may be dispensed on the mere allegation or "possibility" that a union strike violates the Railway Labor Act (*infra*, p. 56) We know of no prior ruling by any federal court which goes so far to emasculate the protections of the Norris-LaGuardia Act. Far from justifying the disregard of Norris-LaGuardia, the rationale that District Courts may as a matter of course issue status quo anti-strike orders whenever it is claimed that a strike violates a federal statute, would approve the strike-breaking restraining orders which Congress in 1932 was most concerned to bar.[24] The temporary restraining order was the special target of Norris-LaGuardia for the very reason that it gave judges hostile to unions a weapon to bar strikes long enough so that the workers' cause was irreparably lost by the time the temporary restraint was lifted.[25]

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[24] It is noteworthy, too, that the abuse of the restraining order power by District Judges which Congress sought to end by its 1932 prohibitions finds no cure in the federal appellate review system. As this case demonstrates, there is no practicable appeal from the grant of a temporary restraining order. Petitioners sought three times within six days to appeal from Judge Holtzoff's illegal orders between Monday, March 28, and Saturday, April 2, but in each case the Court of Appeals summarily dismissed the appeal. The crucial point is that if preservation of the "status quo" can validate the summary issuance of anti-strike restraining orders, there is *no effective relief* in the federal system for the abuse Congress sought permanently to end thirty-five years ago.

[25] "Temporary injunctive relief without notice, or, if upon notice, relying upon dubious affidavits, serves the important function of staying defend-

There is also a direct conflict with the Second Circuit in the ruling below approving an anti-strike restraining order to preserve the status quo on the mere allegation that the union has violated the Railway Labor Act. Such a restraining order was struck down by the Second Circuit in *Chicago, Rock Island & Pacific R. Co.* v. *Switchmen's Union*, 292 F. 2d 61, cert. denied, 370 U.S. 936. There an injunction issued on the ground that the union strike *might* be found to violate the Railway Labor Act, was vacated on the following grounds (292 F. 2d at 71):

> " 'No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction' against a peaceful strike. To overcome that bar plaintiffs had the burden of showing, as a matter of law, that the broad command of § 4 is subject to an exception when a union has violated its duties under the Railway Labor Act and, as a matter of fact, that the defendant here had done that. They were obliged to meet that burden, not simply to show they might be able to meet it; until they met it, the court was without power to issue an injunction whether temporary or permanent."

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ant's conduct regardless of the ultimate justification of such restraint. The preliminary proceedings, in other words, make the issue of final relief a practical nullity . . . In labor cases . . . the injunction cannot preserve the so-called *status quo*; the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences. Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted . . . Judicial error is too costly to either side of a labor dispute to permit perfunctory determination of the crucial issues; even in the first instance, it must be searching." Frankfurter and Greene, *The Labor Injunction*, 200-201 (1930).

A vital federal question calling for this Court's review is presented by the ruling that on the mere *possibility* that a strike would be in violation of the mandates of the Railway Labor Act, anti-strike injunctions can be issued until the merits of the controversy are resolved. Such a "status quo" doctrine creates an exception greater than the rule and invites a full return to the major vices which Congress in 1932 sought to eliminate in its curb on rule by federal injunction in labor relations.

CONCLUSION

A judge who is lacking in judicial objectivity is permitted to dispense—and to enforce by contempt without intervention of jury—crippling anti-strike restraining orders on the bare "possibility" that the strike will violate the Railway Labor Act. And that action is upheld below though the Court of Appeals itself finds that it is not the Union but the railroads which have refused to bargain and thus violated the Act. The Court remands the case for another contempt hearing wherein once again the Union is to be tried by a biased judge without benefit of jury for violation of a restraining order beyond the District Court's power to grant. All that Congress was seeking to preserve in its 1932 guarantees against government by injunction is here at stake.

For the reasons set forth herein it is respectfully submitted that the writ should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,316

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AND H. E. GILBERT, *Appellants*,

v.

BANGOR & AROOSTOOK RAILROAD COMPANY, et al., *Appellees*.

Appeal from the United States District Court for the District of Columbia

Decided May 12, 1967

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss* were on the brief, for appellants.

Mr. Francis M. Shea, with whom *Messrs. Richard T. Conway* and *William H. Dempsey, Jr.*, were on the brief, for appellees.

Before DANAHER, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

BASTIAN, *Senior Circuit Judge:* This is an appeal from a District Court order entered June 15, 1966, upon motion of the plaintiff-appellee railroads,[1] assessing fines against the defendant-appellants, Brotherhood of Locomotive Firemen and Enginemen (BLF&E) and its president, H. E.

[1] The plaintiff-railroads listed in the Motion for Order Assessing Fines are: Boston and Maine Corporation, Central of Georgia Railway Company, Grand Trunk Western Railroad, Illinois Central Railroad Company, Missouri Pacific Railroad Company, Pennsylvania Railroad Company, Seaboard Air Line Railroad Company, Spokane International Railroad Company, Union Pacific Railroad Company, and Texas and Pacific Railway Company.

Gilbert.[2] These fines were assessed for failure to terminate the contempts of which appellants had been adjudged guilty by a previous order of the court, due to violation of the court's temporary and supplemental restraining orders against a strike.

The restraining orders, the contempt conviction, and the fine assessment arose out of the consolidated merits proceedings now on appeal in *Bhd. of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, No. 20,192 on the docket of this court.[3]

As much of the history of the long pending dispute between the railroads and the unions hereinafter referred to will be found in the merits case decision filed this day, this opinion will not duplicate any more of the facts than are necessary to an understanding of the issue herein. The pertinent facts follow:

Following almost five years of failure by most of the railroads and the five operating unions to settle their dispute concerning the manning of trains and engines in freight service,[4] Congress passed Public Law 88-108, 77 STAT. 132 (1963). Pursuant to the provisions of that statute, Arbitration Board No. 282 was convened, and its

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[2] The judgment for the two fines for one day was first entered in the court's oral, and subsequently written, opinion of June 9. *Bangor & Aroostook R.R.* v. *Bhd. of Locomotive Firemen & Enginemen*, 255 F. Supp. 476 (D.D.C. 1966).

[3] Four of the merits cases now before us, Nos. 20192, 20193, 20215 and 20216, were consolidated by order of this court dated July 1, 1966. These are cross-appeals from identical judgments entered May 12, 1966, in two consolidated District Court cases, Civ. A. Nos. 777-66 and 784-66, as enunciated by that court's opinion of May 5. *Bangor & Aroostook R.R.* v. *Bhd. of Locomotive Firemen & Enginemen*, 253 F. Supp. 682 (D.D.C. 1966). The contempt action arose from these proceedings now before us on cross-appeals and further consolidated for argument with seven additional appeals cases.

[4] The dispute covered manning of both the trains and, separately, the engines. Five different unions represent the men affected in these two separate manning issues: engine service employees—Brotherhood of Locomotive Firemen and Enginemen, and Brotherhood of Locomotive Engineers; train service employees—Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and Switchmen's Union of North America.

award covering both engine and train service employees was issued on November 26, 1963, to become effective 60 days later (January 25, 1964) and to continue in effect for two years thereafter (until January 24, 1966). Agreements were then reached among the carriers party to the award and the BLF&E, as well as the Brotherhood of Locomotive Engineers (BLE), both unions representing the engine service employees, whereby the award would continue in force through March 30, 1966, for the parties to the agreements. Thus, the award expiration date for engine service employees was March 31, 1966.

On January 19, 1966, 178 railroads[5] filed suit in the United States District Court for the District of Columbia seeking a declaration that the rules and procedures of the award would be continued in effect after its expiration date.[6] That action, however, concerned only train service employees, and was filed against only the three unions representing those employees.

On February 17, 1966, the BLF&E engine service employee's union filed suit in the Northern District of Illinois for a declaratory judgment that the same Arbitration Award would have no effect after March 30.

Finally, on March 24, the merits case in which the order here on appeal was entered was filed by 181 railroads in the United States District Court for the District of Columbia against the BLF&E, again seeking declaratory and injunctive relief regarding work rules to be in effect upon expiration of the award, this time for engine service employees. Also on March 24, the District Court for the Northern District of Illinois granted a motion filed in that court on February 28 by the defendant railroads, pursuant to which the Illinois BLF&E suit was transferred to the

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[5] Later, on February 3, 1966, the action was dismissed respecting 33 of these carriers.

[6] That case is before us on cross-appeals in *Akron & Barberton Belt R.R. v. Bhd. of Railroad Trainmen*, Nos. 20152, 20172, from the District Court's judgment of April 6 and opinions of March 3 and 28. *Akron & Barberton Belt R.R. v. Bhd. of Railroad Trainmen*, 250 F. Supp. 691 (D.D.C. 1966), and 252 F. Supp. 207 (D.D.C. 1966).

District of Columbia.[7] That suit was then consolidated with the engine service employees' case here.

The first anti-strike temporary restraining order was issued against the BLF&E on Monday, March 28, on motion of the railroads. The order forbade a strike "over any dispute as to the agreements, rules, regulations, interpretations, or practices to be applied by plaintiffs upon the expiration of [the award]." During the hearing on this motion, the BLF&E requested that Judge Holtzoff send the case to another judge since some statements in his March 3 opinion relating to train service employees, *supra* note 7, included matters "affecting the Firemen, when they were not a party to the case." This request was not allowed.[8]

The BLF&E filed in this court a motion for stay of the temporary restraining order on March 30, and we denied the motion and dismissed the appeal on the same date.

On Thursday, March 31, the BLF&E went on a strike which was declared to be solely in regard to a proposed fireman-training program unrelated to the manning question covered by the Arbitration Award. Upon motion of the railroads filed in the District Court, a supplemental temporary restraining order was issued on the same date, March 31, enjoining the BLF&E, and all others subject to the March 28 order, from striking, because "the said strikes may relate" to the manning disputes under the Arbitration Award. At the hearing on this motion for a supplemental order, counsel for the union again requested Judge Holtzoff to send the case to another judge, which request was denied. The supplemental order was also appealed to this court

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[7] The BLF&E opposed the motion to transfer on the ground that, although at that time only the train service employees' case, to which the BLF&E was not a party, was before the District of Columbia District Court, both at oral argument in the District of Columbia and in his written opinion of March 3 the District Judge had indicated that the engine service firemen might also be affected by any rulings in that case.

[8] In response to expression by the BLF&E of fear that the order would let the railroads "do anything they want," the District Court stated that if the railroads disturbed the *status quo*, they would be similarly restrained on application by the BLF&E.

on a motion to stay, which we denied, and we dismissed the appeal on April 1, 1966.

On Saturday, April 2, the railroads filed in the District Court a motion for a show cause ruling for contempt against the BLF&E for failing to call off the strike. During oral argument on the motion the BLF&E again requested Judge Holtzoff to send the case to another judge, which request was again denied; and also moved for a jury trial under 18 U.S.C. Sec. 3692,[9] which was also denied. The contempt hearing came on that same afternoon, at which counsel for the union reiterated its requests. Both were denied. The request for a jury trial was denied (1) because 18 U.S.C. Sec. 3692 applied only to criminal contempt, and (2) because the statute which was reenacted in Sec. 3692 had been held, in *United States* v. *Mine Workers of America*, 330 U.S. 258, at 298 (1946), to apply only to cases to which the Norris-La Guardia Act[10] applied. The union's oral response was a "denial in full that we have committed any contempt whatever, in any way, of any order of this court, and secondly, that the outstanding order of this court is invalid." The District Court ruled as irrelevant proffers by the BLF&E regarding (1) the legality of the strike and the invalidity of the order, (2) whether there was a "substantial compliance" in that the union had tried to negotiate with the railroads on the conditions for a return of the men, and (3) whether the railroads had refused to bargain at all times prior to the grant of this equity injunctive relief. The BLF&E and its president, H. E. Gilbert, were found guilty of civil contempt, and a coercive fine "looking to the future as a means of compelling compliance" was imposed: $25,000 per day for the BLF&E and $2,500 per day for H. E. Gilbert, conditioned upon failure to terminate the strike by noon of the next day, Sunday, April 3. Late on Saturday, April 2, the BLF&E appealed the contempt order and filed a motion to stay. We dismissed the appeal on Sunday, April 3.

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[9] 62 Stat. 844 (1948).

[10] 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1964).

A motion to show cause why the fine should not be increased was filed on Sunday afternoon, April 3, with affidavits that the strike was continuing. A rule to show cause was issued for the next morning, Monday, April 4. However, on that morning the railroads moved to vacate the rule since the strike had terminated. The rule was vacated by an order presented by the railroads and issued by the District Court on April 6. On April 6, when counsel for the railroads presented the order to vacate, the court commented that the order vacated only the rule to show cause (regarding increased fines) and that rights might have, and probably had, accrued under the restraining and contempt orders, but that the court did not take up such matters *sua sponte*.

On April 22, the BLF&E filed a motion to disqualify Judge Holtzoff under 28 U.S.C. Sec. 144,[11] accompanied by an affidavit of its president, H. E. Gilbert. This affidavit included allegations as to events on March 3, March 28, March 31, and April 2,[12] as well as to events on April 4 and 6. Appellants pursue on appeal the allegations pertaining to the events of April 4 and 6. The affidavit cited Judge Holtzoff's remarks during the April 6 hearing to vacate the rule to show cause as prompting the railroads to act to force union payment of contempt fines which had accrued. It also asserted on information and belief that on Monday, April 4, Judge Holtzoff had informed the press, with an admonition not to quote him directly, that union contempt fines had accrued. The motion to disqualify was denied for legal insufficiency of the accompanying affidavit.

On April 29, the railroads moved for an order "assessing fines for failure to terminate contempts." At the same time they moved also for an order awarding them com-

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[11] 62 STAT. 898 (1948), as amended, 63 STAT. 99 (1949).

[12] These matters, not presented on appeal here, were that the trial judge's March 3 opinion in solely a trainmen's case adversely adjudicated the rights of the firemen; and also that at the original March 28 temporary restraining order hearing, at the March 31 supplementary order hearing, and at the April 2 contempt hearing, the trial judge refused to allow union counsel to put on the record his reasons for requesting transferral to another judge.

pensatory damages. During a May 4 hearing on the merits case, Judge Holtzoff clarified, in regard to the fine assessment motion, that only one day's fines were shown to have accrued by the facts as related in that motion. On May 6, the BLF&E filed its opposition to the railroad's April 29 motion, maintaining (1) that the railroads lacked standing to institute assessment proceedings on what were really punitive rather than coercive fines: (2) that the BLF&E and its president were due a jury trial under 18 U.S.C. Sec. 3692; (3) that they had "substantially complied" with the order; and (4) that, again, the original contempt order of April 2 was invalid for all of the reasons previously enunciated in opposition to that order. The motion was set for hearing on June 17.

On June 9, a hearing was convened, initially for the purpose of deciding whether the motion should be heard as previously scheduled on June 17, or in the early fall. The railroads favored such a postponement but the BLF&E requested that the hearing proceed on June 17 on the coercive fine portion of the motion. Judge Holtzoff, however, immediately entered an oral judgment for the two coercive contempt fines for the one day's duration of the contempts, which he reiterated in a written opinion of the same date, June 9. 255 F.Supp. 476 (D.D.C. 1966). Regarding these fines, Judge Holtzoff ruled that his earlier rulings had already established that the union and its president were guilty of contempt and that their desire for negotiation was not an excuse for failure to comply with his order to end the strike; that those rulings had already imposed the coercive fine and that this was a ministerial action; and that the rulings had closed to further argument the questions of regularity of the procedures, the validity of the orders, and jury trial. Counsel for the BLF&E and its president contended that the earlier orders had not in fact been affirmed by this court but, rather, were dismissed as not appealable. He declared that he wanted to prove substantial compliance, and challenged the affidavits accompanying the railroads' motion to assess the fines.

It is this judgment of June 9 and subsequent order of June 15 assessing fines which the BLF&E and its president

now appeal. They challenge the failure to disqualify, the validity of the early underlying orders and procedures, the lack of jury trial, the failure to find substantial compliance, the availability of the injunction under the Norris-La Guardia Act, and the finding that the strike was "unlawful."

I

Motion to Disqualify

On the record, union counsel first requested Judge Holtzoff to send these proceedings to another judge during the original March 28 temporary restraining order hearing. This request was repeated during the March 31 supplemental order hearing, at the April 2 hearing on the original contempt rule to show cause, and again at the hearing on the return that same afternoon, April 2. All of these requests were denied. At the afternoon proceeding on April 2, in reply to the request for transfer, Judge Holtzoff stated: "This is merely a proceeding to enforce a restraining order and it is purely impersonal." The motion to disqualify under 28 U.S.C. Sec. 144 was filed on April 22, with the accompanying affidavit of BLF&E president, H. E. Gilbert. Judge Holtzoff overruled the affidavit as insufficient that same afternoon in these words:

> "[A]n affidavit of bias and prejudice must show personal bias and personal prejudice against the party. That affidavit doesn't show it at all."

Appellants argue the disqualification issue before this court only as to the affiant's allegations of prejudicial events on April 4 and 6 regarding, respectively, (1) an alleged statement by Judge Holtzoff to the press on Monday, April 4, that fines were then due and payable; and (2) his statements, made while hearing the submitted order to vacate the April 3 show cause rule to increase fines, to the effect that rights had accrued under the contempt order, but that such matters must be initiated by counsel.

The disqualification statute, 28 U.S.C. Sec. 144,[13] is mandatory and automatic, requiring only a timely and sufficient affidavit alleging personal bias or prejudice of the judge. The judge is a silent defendant, unable to make findings on the truth or falsity of the affiant's allegations. The truth and good faith of such allegations must be presumed in so far as the affiant is concerned, *United States* v. *Hanrahan*, 248 F.Supp. 471, 474 (D.D.C. 1965); and the allegations may be based upon information and belief, *Berger* v. *United States*, 255 U.S. 22, 34 (1920).

> "If the affidavit, application and certificate of counsel comply with the statutory standards, the judge has no alternative but to recuse himself, no matter how defamatory the charges may be and even if they are known to the Court to be false." *United States* v. *Hanrahan*, 248 F. Supp. at 475.

On the other hand, the statutory standards and safeguards against misuse of this statute are necessarily stringent and must be strictly enforced. The motion and affidavit must be timely filed, show a true personal bias, and must allege specific facts and not mere conclusions or generalities. *Inland Freight Lines* v. *United States*, 202 F.2d 169 (10th Cir. 1953); *Simmons* v. *United States*, 302 F.2d 71 (3d Cir. 1962).[14]

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[13] 28 U.S.C. 144:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

[14] A thorough and accurate review of the law in this area was set out by the District Court in this circuit in *United States* v. *Hanrahan*, *supra*.

Preliminarily, the oral requests for transfer made during the temporary restraining order proceedings of March 28, the supplemental restraining order proceedings of March 31, and the morning and afternoon contempt proceedings of April 2 do not suffice as proper motions to disqualify under 28 U.S.C. Sec. 144.

Secondly, the motion to disqualify and the allegations contained in the accompanying affidavit argued on appeal are legally insufficient to have required the judge to recuse himself in this case. Aside from its essential omission in not specifying any fact indicating personal prejudice, allegation No. 7 of the affidavit (that on April 4 Judge Holtzoff had informed the press that "fines had accrued automatically because the union remained on strike for about 12 hours after the deadline. . . . [and] were now due and payable," and that the statements to the press "were made under the restriction that the press not quote Judge Holtzoff directly,") is to a degree, of course, controverted by the very event subsequently alluded to and cited by the affiant—the later statements by the judge in open hearing on April 6 indicating that the fines would not be payable until an assessment-collection action was brought. While sufficiently made on information and belief, *Berger* v. *United States, supra* at 34, this allegation shows "no more than an expression of prior opinion on a legal question," which was held in *Loew's, Inc.* v. *Cole*, 185 F.2d 641, 646 (9th Cir. 1950), to be not within the statute.[15] At most, it seems, Judge Holtzoff was expressing his opinion regarding the law *after* he had made an adjudication and issued a conditional contempt order. Such a statement cannot be characterized as "a prejudgment that contempt defendants have violated his restraining order," as alleged by appellants, since the contempt finding had been made *earlier* and the fines coercively set. It was fine collection

[15] *Scott* v. *Beams*, 122 F. 2d 777 (10th Cir. 1941), *cert. denied*, 315 U.S. 809 (1942), and *In re Union Leader Corp.*, 292 F. 2d 381 (1st Cir. 1961), concern, respectively, less blatant and more blatant expressions by trial judges than that alleged here, both of which were held insufficient to invoke Sec. 144.

or assessment, upon continuance of this contemptuous strike, which lay ahead.

Appellants' allegation No. 8 is directed towards and cites Judge Holtzoff's assertions during the April 6 hearing on the order to vacate the show cause rule for increased fines, that rights might have accrued, and probably had accrued, under the contempt order; and his statement that consideration of the matter of fines must be initiated by counsel and could not be handled by the court *sua sponte*. The allegation that this "actually prompted the railroads to act to force payment" is deficiently conclusory. *Inland Freight Lines* v. *United States, supra.* The language itself reflects no prompting, no embroilment in the "accusatory process."[16] Nor did Judge Holtzoff "[take] a position apparently inconsistent with an ability to judge the facts fairly." *Texaco, Inc.* v. *F.T.C.*, 118 U.S.App.D.C. 366, 336 F.2d 754 (1964).

Having found the affidavit legally deficient, we need not and do not pass upon appellees' contention that appellants waived their rights under 28 U.S.C. Sec. 144 or that the motion and affidavit were untimely filed. Finally, we do not pass upon appellees' contention that the motion and affidavit seeking disqualification were also deficient for failure to include the required certificate of counsel of his own good faith as well as that of the affiant, nor that the certification improperly failed to apply to the motion as well as to the accompanying affidavit. We do recognize, although we do not pass upon it here, that proper certification is a vital and significant requirement to prevent abuse of Sec. 144.[17]

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[16] Compare *In re Murchison*, 349 U.S. 133 (1955).

[17] It has been generally held under this statute that counsel should properly certify in such motions as to his own good faith as well as to the good faith of the affiant. See *United States* v. *Hanrahan, supra.*

II

Denial of Basic Constitutional and Statutory Rights

Appellants further and variously contend (1) that the June 9 judgment and June 15 order assessing fines were themselves punitive "imposition" of such fines, and so constituted a separable criminal contempt action; (2) that they were therefore wrongfully denied a jury trial in a criminal contempt action and denied their right to allocution, since they were not present at their "sentencing" on that occasion; (3) that even if this were not a criminal contempt proceeding, they were entitled to a jury trial under 18 U.S.C. Sec. 3692, which provides for jury trials in labor dispute contempt cases; and finally (4) that they were denied due process by the lack of proper notice and a full hearing in the June 9 fine assessment proceeding.

We cannot agree that these proceedings evolved, at any stage, into a criminal contempt action. The June 9 proceeding was not that at which these coercive fines were in fact "imposed." The appellants, therefore, were not wrongly deprived of a contempt jury trial on that basis. Nor were they due a jury trial here under Sec. 3692. Every civil contemnor is entitled, however, to those fourteenth amendment safeguards applicable to all judicial proceedings, and if it can be found that appellants did present a genuine issue of fact regarding their substantial compliance or inability to comply with the District Court's orders,[18] they had a due process right to a full, impartial hearing with notice and an opportunity to present this defense.[19]

(1) Appellants conceded, and indeed argued, in their brief and at oral presentation, that this was initially a civil contempt proceeding, both in form and in procedure. They contend, however, that the June 9 assessment proceeding was criminal in nature because the unions had by that time returned their men to work and therefore held no "key" to

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[18] Either of these situations, well proven, would be a complete defense to a coercive contempt proceeding. *Maggio* v. *Zeitz*, 333 U.S. 56 (1945).

[19] See *Parker* v. *United States*, 153 F. 2d 66 (1st Cir. 1946).

their own exoneration from what was then a punitive action. Actually, at the earlier proceeding on April 2, a clearly conditional and coercive *per diem* fine had been imposed to insure that the previous orders of the court would be complied with as of a specified future date. The June 9 proceeding and June 15 order assessed the very fines which had been conditionally imposed on April 2. This, then, is not the situation presented in *Flight Engineers Internat'l Ass'n* v. *Eastern Air Lines, Inc.*, 301 F.2d 756 (5th Cir. 1962), upon which appellants rely. In that case, a contempt was adjudicated and a fine subsequently imposed, both *after* the contemptuous acts had ceased, without any possible coercive motive or characteristic, since the date for compliance had passed. In the case now before us, the fine-imposing proceeding, to coerce compliance, set a *future* performance date. A later assessment of the fines so imposed, upon a showing of non-compliance, is not sufficient to require the classification of such an assessment as separately punitive. Certainly, the characteristic of a coercive civil contempt action is not abandoned when, although both the adjudication of contempt and imposition of the fine are coercively prospective, the final assessment of such coercively imposed fines does not occur prior to the termination of the contemptuous act. Because a question of fact must be determined at this assessment proceeding (that of non-compliance by the specified performance date), the proceeding does not necessarily become a punitive, criminal action wherein the recalcitrant party must be afforded the procedural safeguards of a criminal contempt charge.[20]

Failing to be criminal or punitive in nature, these proceedings could at no stage compel a jury trial on that basis, nor could they support appellant's claim of a wrongful denial of the allocution right granted to criminal defendants to be present and heard at the time of their "sentencing."

(2) Nor are appellants entitled, under 18 U.S.C. Sec.

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[20] *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966), has established what the Supreme Court suggested in *United States* v. *Barnett*, 376 U.S. 681, 694-95 n. 12 (1964), that other than petty criminal contempt sentences will no longer "be imposed by federal courts unless a jury trial has been received or waived."

3692,[21] to a jury trial at these proceedings assessing previously imposed civil, coercive fines. First, like all of the general federal contempt statutes,[22] it is not clear from the language of this provision whether it applies solely to criminal contempt or is applicable also to civil contempt proceedings, as appellants here contend. It would seem, however, that the accepted view is that this limitation is not applicable to a civil contempt case.[23] No case of which we are aware has held to the contrary,[24] and we are not persuaded that the rule should be otherwise. The fact that, since the completed revision in 1952 of Titles 28 and 18, *all* of the general federal contempt statutes have been placed in Title 18, Crimes and Criminal Procedure, seems to indicate that these provisions are applicable only to cases of criminal contempt. Appellants cite various statutes containing specific contempt provisions, to show that Congress can and does distinguish between procedures for civil and criminal contempt when such is its intent. However, none of those statutes appears under the criminal title in the first instance.

It is established, and here uncontested, that 18 U.S.C. Sec. 3692 is the 1948 reenactment of former Section 11 of the Norris-La Guardia Act.[25] Judicial interpretations and

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[21] 18 U.S.C. Sec. 3692: "In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed."

[22] 18 U.S.C. Sec. 401 (power of court); 18 U.S.C. Sec. 402 (contempts constituting crimes); 18 U.S.C. Sec. 3691 (jury trial of contempts which also constitute criminal offenses).

[23] *Contra*, *Civil and Criminal Contempt in Federal Courts*, 17 F.R.D. 167, 174 (1955); see Cong. Rec. 6337, 6453 (Remarks of Senators Norris and Dyer).

[24] But see *Penfield Co.* v. *S.E.C.*, 330 U.S. 585 (1947), which assumed *arguendo* that 18 U.S.C. Sec. 401 (1948) ("power of court" statute) would be applicable to a civil contempt case. In two recent federal cases in which the issue could have been presented, a jury trial under Section 3692 was denied instead, on the ground that they were not true labor dispute cases. *In re Piccini*, 35 F.R.D. 548 (W.D. Pa. 1964); *Mitchell* v. *Barbee Lumber Co.*, 35 F.R.D. 544 (S.D. Miss. 1964).

legislative history regarding that provision are, therefore, applicable and directive regarding its reenactment in Section 3692.[26] In interpreting both former Section 11 of Norris-La Guardia and former Section 22 of the Clayton Act, 38 STAT. 738-9, now 18 U.S.C. Sec. 3691 (regarding jury trial of contempts which also constitute criminal offenses), *Russell v. United States*, 86 F.2d 389 (8th Cir. 1936), stated that statutes which so limit the inherent judicial power to try contempts without juries should not be construed to extend beyond their clear terms. In *Michaelson* v. *United States*, 266 U.S. 42 (1924), the Supreme Court construed this former enactment of Sec. 3691 to be limited to criminal contempt proceedings although, as in Sec. 3692, that provision nowhere expressly excluded civil contempt proceedings. The Supreme Court was clearly concerned with the "authority of Congress to set aside the settled rule that a suit in equity is to be tried . . . without a jury," 266 U.S. at 65,—a possible conflict which, of course, we could not ignore if we construed Sec. 3692 to be not limited to criminal contempt proceedings. Finally, we note that the House Report on the 1948 revision of Title 18 describes that revision as an addition of "those criminal provisions in other titles." H.R. REP. No. 304, 80th Cong., 1st Sess. 1.[27]

Secondly, and decisively, we feel that Sec. 3692 applies only to those contempt proceedings arising from injunctions governed by the Norris-La Guardia Act,[28] which, as we discuss below, does not apply to prohibit or govern injunctive proceedings regarding acts determined to be violative of the Railway Labor Act.[29] Such was the rationale of the District Court injunctive proceedings here before us. That the scope

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[25] See Reviser's Note to 18 U.S.C.A. Sec. 3692 (1958); H.R. REP. No. 304, 80th Cong., 1st Sess. 9, A 176; H.R. REP. No. 152, 79th Cong., 1st Sess., A 164.

[26] See *United States* v. *Barnett*, *supra* note 20.

[27] MOORE'S FEDERAL PRACTICE, Sec. 38.33 (1) and (2), concluding that there is no such statutory right to jury trial in civil contempt cases under, *inter alia*, 18 U.S.C. Sec. 3692.

[28] Note 9 *supra*.

[29] 44 STAT. 577 (1926), as amended, 45 U.S.C. Secs. 151-88 (1964).

of Sec. 3692 is to be limited to contempts of injunctive orders governed by Norris-La Guardia is indicated, it would seem, by the very legislative debates concerning former Section 11 which appellants claim are persuasive that its reenactment should apply to both civil and criminal cases. Note 20 *supra*. In *United States* v. *United Mine Workers*, 330 U.S. at 298, the Supreme Court held that former Section 11 applied only to cases arising under the Norris-La Guardia Act, and cases subsequent to the enactment of Sec. 3692 have similarly limited this reenactment of former Section 11. *Madden* v. *Grain Elevator Workers*, 334 F.2d 1014 (7th Cir. 1964) (inapplicable to proceedings under the Labor Management Relations Act); *Mitchell* v. *Barbee Lumber Co.* 35 F.R.D. 544 (S.D. Miss. 1964) (Sec. 3692 represents a reenactment of former Section 11). It is not applicable to an injunction issued to aid in enforcement of the Railway Labor Act.[20]

(3) Appellants' contention that appellees here lacked standing to initiate the motion to assess these conditionally imposed fines is also unacceptable. Appellants' arguments regarding lack of standing beg the question of whether this is a criminal contempt action (wherein private parties would unarguably lack standing to initiate such proceedings), FED. R. CRIM. P. 42(b), a question we have disposed of above. Upon noncompliance with a coercively sanctioned order, the party for whose ultimate benefit it was issued, who has been seeking the civil remedy for its own benefit, should, it seems, be able to institute such an assessment proceeding. Undoubtedly, a coercive contempt order includes a benefit to the plaintiff by coercing compliance with

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[20] See cases cited note 38, *infra*. The Norris-LaGuardia Act applies to cases of injunctions "involving or growing out of a labor dispute" and denies jurisdiction to United States courts unless certain showings are made, see 29 U.S.C. § 107 (1964). The term "labor dispute" is broadly defined, see 29 U.S.C. § 113(c) (1964). But in essence that Act denies jurisdiction to issue the kind of injunction theretofore issued by federal courts in diversity cases on a showing of illegality under common law due to fraud or breach of contract. In all such cases where the conditions are met, contempts are subject to jury trial. But these provisions do not limit injunctions provided for by or issued in aid of other federal statutes in the labor relations field, including the Railway Labor Act.

an order entered in its behalf.[31] *McCauley v. First Trust & Savings Bank*, 276 Fed. 117 (7th Cir. 1921), upon which appellants rely to exemplify an unallowable contempt motion by an "incompetent" party, is inapposite. That was a declared criminal contempt situation.

(4) Like any civil litigant, a civil contemnor is, however, clearly entitled to those due process rights, applicable to every judicial proceeding, of proper notice and an impartial hearing with an opportunity to present a defense.[32] Judge Holtzoff indicated this at the Supplementary Restraining Order hearing of March 31. There he told appellants that they would be due a hearing if they violated his restraining orders. We do not find infringement of this principle in either of the proceedings imposing the initial or supplementary orders of March 28 and 31, nor in the April 2 finding of contempt. Appellants were simply limited in those proceedings to the issue before the court in each instance and were not permitted to enlarge the scope of such hearings to include argument on the validity of the underlying orders or to contend that further negotiation on the terms for a return to work constituted satisfactory com-

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[31] See *Civil and Criminal Contempt in Federal Courts*, note 20 *supra*, 17 F.R.D. at 172. The alternative would be to say that appellees here lacked standing to move for assessment of these previously imposed coercive fines because the contemptuous strike had already ceased, and they would therefore gain no further civil remedy for themselves (the return of men to work their railroads). This, of course, would narrow the standing of such parties to move assessment of such conditionally imposed fines to situations where the already adjudged contempt was continuing—which might, in effect, call for a new such motion for each day of a continuing contempt in order to put teeth into this coercive device. Otherwise, by waiting until the contemptuous action has ceased, the party who is supposed to benefit thereby is denied an interest, suddenly, in seeing these imposed and accumulated fines enforced; and only the Government, recipient of such coercive fines, is left with standing to move assessment of these fines, as in cases of criminal contempt. This might seem proper except that, clearly, the coercive contempt device has a basic function, apart from vindication of the court's authority, as in criminal contempt, of preserving a benefit for or preventing harm to the second party to the action. To deny them standing to see that imposed coercive fines will be assessed, would seem to go far towards emasculating the coercive effect of the imposition of such fines, since the likelihood of their assessment would be reduced.

[32] *Parker v. United States*, *supra*.

pliance. If, however, it can be said that, during the June 9 hearing at which the judgment assessing the previously imposed fines was entered, appellants raised a genuine issue of fact regarding compliance, they were entitled to a hearing on that issue. While it seemed apparent that the men were not back at work by this deadline, that was not, as appellees would contend, the only issue. To that extent, the District Court was incorrect in stating at the June 9 hearing that "there is no issue to try . . . because the picket lines were still on after Sunday noon." Either compliance or inability to comply is a defense in coercive contempt proceedings. *Maggio* v. *Zeitz, supra*. During the proceedings of April 2 and June 9, counsel for appellants argued, variously, that the unions "have made every effort to comply with that order"; that they had "substantially complied with the order of the Court in . . . efforts to settle the strike"; and that they "did in fact . . . send a telegram . . . ordering them to call off the strike."[33] Indeed, counsel for the railroads,

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[33] More completely, the remarks of counsel for appellants at the afternoon hearing of April 2 were as follows:

> ". . . we have made every effort to comply with that order by negotiating with the railroads for an orderly return to work under the usual conditions of such return from strikes in the railroad and other industries in the United States."
>
> . . . . . .
>
> ". . . Mr. Gilbert told the press that he was ordering the men to go back on the usual conditions. I think that is all your order requires and that is all that a reasonable interpretation of it should be. . . ."

At the hearing of June 9, the remarks of counsel for appellants were as follows:

> "But I would like to put on the record an offer of proof, that the Brotherhood substantially complied with the order of the Court in its efforts to settle the strike, which were frustrated and rebuffed by the railroads. In other words, I say an issue of fact, we did comply with the order and we are entitled to a trial on that."
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> . . . . . .
>
> "I respectfully suggest we are entitled to a trial on the question whether we did in fact make such an order, because we did in fact, right after twelve o'clock that day, send a telegram from Cleveland to the different places, ordering them to call off the strike."

at the June 9 proceeding, noted the following:

> "... [Counsel for the unions] makes the point, in opposition to any fines for contempt, that defendant substantially complied with the order of the Court in its efforts to settle the strike, which were frustrated and rebuffed by these plaintiffs, so that no fine may properly be assessed against it.
>
> "He is apparently seeking to raise issues of fact ...."

Counsel requested detailed particulars and a proffer of proof to see if what the union counsel proposed to prove was in fact relevant.

We do not suggest that mere attempts to further negotiate terms for a return to work would be a compliance with the orders of the District Court. Judge Holtzoff correctly held at the June 9 hearing that "the mere fact that you were negotiating does not constitute compliance with the order."[34]

However, it would appear that it is possible that counsel for appellants was urging a more absolute "substantial compliance," or an inability to comply, with the District Court's unconditional order to call off the strike and return to work. At any rate, it is not apparent that the hearing of June 9 was free from this contested factual issue, and the hearing to which appellants would thus be entitled was not provided by what was initially to have been simply a proceeding to set the date for a full hearing on the fine assessment motion. Instead, the District Court made an immediate finding on the motion on the basis that there was "no issue to try." Certainly the history of contempt litigation, especially in regard to labor disputes, prescribes extreme care and insistence on the full indicia of due process in contempt cases. In such instances, not only must the District Court consider whether there is indeed a contempt

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[34] Much of the language of union's counsel in this regard during both the April 2 contempt hearing and the June 9 fine assessment hearing suggests that the order to return to work permitted negotiation of the "terms and conditions of return."

but also whether if so, it be of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey. Flexibility in approach will permit consideration of the complexity of the outstanding order, possible ambiguities, the difficulties in arranging compliance and the extent of efforts to obey its terms. That a hearing on such aspects is or can be of great importance can scarcely be gainsaid.

III

Applicability of *Mine Workers* and Norris-La Guardia

Finally, we give brief consideration to appellants' challenge to the substantive legality of the District Court's underlying restraining orders of March 28 and 31. Specifically, appellants contend that Section 4 of the Norris-La Guardia Act [35] was applicable to this labor dispute case to deprive the trial court of the injunctive jurisdiction requisite to issue such orders.

First, appellants felt it to be requisite, as a premise to disputing the validity of the District Court's restraining orders, to establish that they were not precluded under any doctrine of *United States* v. *Mine Workers, supra,* from so challenging the underlying order in a *coercive* civil contempt proceeding. The *Mine Workers* case dealt with, and has become a basic directive in regard to, the right of defendants in criminal and *compensatory* civil contempt proceedings to attack the validity of the underlying orders on which the alleged contempts are based. That case did not, however, specifically deal with a coercive civil contempt order in this regard.[36]

It would appear to be fallacious to hold that the efficacy of coercive civil fines is to be governed by the compensa-

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[35] 29 U.S.C. Sec. 104 (1964).

[36] In *Mine Workers,* the civil contempt judgment of the District Court, which the Supreme Court indicated that it would have set aside, was a flat $3,500,000 remedial, compensatory fine, none of which was coercively conditional upon a failure to terminate the strike there in issue. The plaintiff was there clearly to "profit by way of a fine" under the District Court order. 330 U.S. at 295.

tory fine rationale of *Mine Workers*, which allows alleged contemnors to challenge the propriety of the underlying order in defense of their otherwise contemptuous disobedience of that order.[37] Certainly, a prospective, coercive fine, short of an absolutely imposed punitive sanction but beyond the remedial function of a compensatory fine, will serve to preserve the court's "power to order maintenance of a *status quo*," only to the degree that litigants are prevented from pre-judging the validity of that court's orders. Rather, as is true of punitive fines under *Mine Workers*, it would seem that prospective, coercive fines should be enforceable despite a subsequent determination by the District Court, or on appeal, that the disregarded order was in fact beyond the ordering court's jurisdiction.

Such an analysis is not, however, critical or determinative in the case now before us, because we find that the Norris-La Guardia Act does not apply to preclude these underlying temporary restraining orders. It is not here disputed that Norris-La Guardia will not apply to preclude injunctive relief in cases in which the acts to be enjoined are in violation of the Railway Labor Act.[38] Additionally, any test of the applicability of the Norris-LaGuardia Act to the issuance of a temporary restraining order must be mindful of the general standards governing the issuance of temporary orders of this nature, as opposed to the issuance of permanent or even preliminary injunctions. Whether or not any provision of the Railway Labor Act had been violated by either or both of the opposing parties, was and is precisely the subject of the consolidated merits case. Determination of that issue will, in turn, be dispositive of whether the strike here temporarily restrained was actually in violation of that Act. The purpose of the March

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[37] Compensatory fines provide relief for damages sustained through the contemnor's violation of a court order—a sufferance which in a legal sense, of course, can not be said to exist if the underlying order was invalid. "But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised." 330 U.S. at 304.

[38] See *Virginia Ry.* v. *Federation*, 300 U.S. 515 (1937); *Graham* v. *Bhd. of Locomotive Firemen and Enginemen*, 338 U.S. 232 (1949); *Bhd. of Railroad Trainmen* v. *Chicago R. & Ind. R.R.*, 353 U.S. 30 (1957).

28 and 31 restraining orders was simply, it would seem, to preserve the status quo in light of a public interest in avoiding a major rail strike which was possibly in violation of "positive mandates" of the Railway Labor Act. Certainly, as noted, if the strike was so illegal, Norris-La Guardia would not apply to deprive the District Court of jurisdiction to enjoin it.[39] We are not required here to decide the legality of this strike under the Railway Labor Act in order to uphold the issuance of a temporary restraining order by the District Court, which felt that there was a possibility that the strike would so be in violation of the mandates of that statute—as evidenced and enforced by its subsequent finding to that effect in the merits case which was then before it. The appellee-railroads were contending that the strike was illegal precisely because in abrogation of the Railway Labor Act. That was the statutory source of this contested issue.[40] The Norris-La Guardia Act does not, therefore, properly apply here to preclude the initial interlocutory relief of these temporary restraining orders of March 28 and 31.

Accordingly, it follows that the case will be remanded to the District Court for a hearing to the extent set forth in Part II (4) of this opinion.

So ordered.

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[39] *Bhd. of Railroad Trainmen* v. *Chicago R. & Ind. R.R.*, *supra* note 38, at 39-42; 3 CCH 1966 LAB. L. REP. ¶ 5270.

[40] Compare *Bhd. of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir. 1966), *affirmed*, 385 U.S. 20.

Filed May 12, 1967. Nathan J. Paulson, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1966.

No. 20,316

Civil 777-66

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AND H. E. GILBERT, *Apellants*,

v.

BANGOR & AROOSTOOK RAILROAD COMPANY, et al., *Appellees*

Appeal from the United States District Court for the District of Columbia.

Before: Danaher, Circuit Judge, Bastian, Senior Circuit Judge, and Leventhal, Circuit Judge.

JUDGMENT

This case came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that this case is remanded to the District Court for a hearing to the extent set forth in Part II(4) of the opinion of this court this day filed herein.

It is further ORDERED by the court that appellants herein recover from appellees their taxable costs on this appeal, and have execution therefor.

Per Senior Circuit Judge Bastian.

Dated: May 12, 1967.

APPENDIX B

Statutes Involved

1. 18 U.S.C. 3692, 62 Stat. 844 provides in part: Jury Trial for Contempt in Labor Dispute Cases. In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case inyolving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.

2. 28 U.S.C. 144, 62 Stat. 898 provides:

Bias or Prejudice of Judge

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed no less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

3. The *Norris-LaGuardia Act*, 29 U.S.C. 101—115, 47 Stat. 70, provides in part:

> Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . .

from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute . . ;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified.

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from

electing to pursue his ordinary remedy by suit at law or in equity.

Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Sec. 13(c). The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 353

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AND H. E. GILBERT, *Petitioners*,

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals (App. A of Petition), not yet officially reported, is unofficially reported at 55 CCH Labor Cases ¶ 11,914. The opinion of the District Court relating to assessment of the coercive civil contempt fines incurred by petitioners (JA 204-206) is reported at 255 F. Supp. 476. An opinion of the District Court reported at 253 F. Supp. 682, although largely devoted to other matters, sets forth in footnote 5 (253 F. Supp., at

689-690), that Court's reasons for denying the motion to disqualify for bias and prejudice.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition. With respect to the statements in the footnote on page 2 of the petition, we note our view that the case involves a civil, rather than a criminal, contempt fine and that the petition could be filed at any time within the 90-day period allowed for petitions from judgments by a court of appeals in civil cases.

Questions Presented

1. When fines are imposed in a civil contempt proceeding conditioned upon failure to terminate the contempt by a specified future time and the contempt is not so terminated, does a proceeding after termination of the contempt to assess and collect the fines so imposed constitute a criminal contempt proceeding?

2. Whether 18 U.S.C. § 3692 requires a jury trial in any contempt proceeding arising out of disobedience of an order temporarily restraining strikes in violation of the Railway Labor Act and, if so, whether it requires a jury trial in a civil contempt proceeding?

3. Whether a motion to disqualify the trial judge and an accompanying affidavit filed pursuant to 28 U.S.C. § 144 were legally sufficient to require the judge to disqualify himself and, if so, whether they were timely, whether they were properly certified and whether petitioners have waived their rights under the statute?

Statement of the Case

1. *P.L. 88-108 and the Arbitration Award.* In November of 1959, most of the nation's Class I railroads served five

unions representing their operating employees with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) of proposed changes in a number of obsolete rules which were causing serious overmanning of trains.[1] In September of 1960, those unions served the railroads with Section 6 notices of various counterproposals. The parties exhausted the "major" dispute procedures of the Railway Labor Act (45 U.S.C. §§ 151-160) without settling this dispute, and thus were in a position to resort to self help including strikes by the unions. See *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

To prevent such a disaster, the President proposed legislation and the Congress responded by enacting P.L. 88-108 (77 Stat. 132). The bill proposed by the President[2] provided for regulation by the ICC of all issues raised by the 1959 and 1960 Section 6 notices, through interim rules that would "remain operative until the parties reach agreement regarding the matter involved, or if no agreement is reached, for two years following the date the interim rule goes into effect." The bill did not contain any provision for disposition of the Section 6 notices. Rather, it provided for "continued collective bargaining" upon those notices and that, if no agreement was reached prior to expiration of the ICC rules, the President should "make such further recommendations, if any, as he deems appropriate, including his recommendation as to whether this joint resolution should be extended." In the committee hearings, which related only to the President's bill, the Secretary of Labor con-

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[1] In addition to the petitioner Brotherhood of Locomotive Firemen and Enginemen (BLF&E), the notices were served on the Brotherhood of Locomotive Engineers (BLE), the Brotherhood of Railroad Trainmen (BRT), the Switchmen's Union of North America (SUNA) and the Order of Railway Conductors & Brakemen (ORC&B).

[2] Hearings on H.J. Res. 565, 88th Cong., 1st Sess., at 1-3; Hearings on S.J. Res. 102, 88th Cong., 1st Sess., at 1-3.

firmed that the Section 6 notices would continue outstanding during the period of ICC regulation, that the parties would be required to continue bargaining with respect to those notices, that upon the expiration of the period of ICC regulation the parties once again would be in a position to resort to self help (if no agreement had been reached) since the "major" dispute procedures of the Railway Labor Act had been exhausted with respect to those notices, and that in such an eventuality an extension of the legislation almost certainly would be recommended.[3]

It was in this context that representatives of the railroads assured the committees that, if the President's bill was enacted, they would continue bargaining with the unions in an effort to resolve the dispute created by the outstanding 1959 and 1960 Section 6 notices. See Petition, at 4-5. The Congress, however, rejected the approach proposed in the President's bill. The Congress preferred "to provide for a complete solution which would terminate the dispute at this time" and thus avoid the possible "necessity for a resumption of congressional activity in a few months time."[4] And, it sought to achieve this objective by adopting the "time-tested provisions of the Railway Labor Act"[5] instead of resorting to interim ICC regulation. P.L. 88-108, therefore, provided that the two major issues in dispute should be submitted to a board of arbitration (subsequently known as Arbitration Board No. 282), and (§ 3) that the Award of that board should "constitute a complete and final disposition" of the portions of the Section 6 notices raising those issues. The statute also provided (§ 4) that the arbitration should "be conducted pursuant to sections 7 and 8 of the Railway Labor Act" and that "the board's

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[3] See, *e.g.*, Hearings on H.J. Res. 454, *supra* at 59-60, 64, 65, 69, 107; Hearings on S.J. Res. 102, *supra* at 54, 55-56, 61-81.

[4] S. Rept. No. 459, 88th Cong., 1st Sess., at 10.

[5] S. Rept. No. 459, *supra* at 3.

award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act." Arbitration Board No. 282 and its Award did comply with these and other requirements of the statute. *Brotherhood of Loc. Fire. & Eng.* v. *Chicago, B. & R. Co.*, 225 F. Supp. 11 (D.D.C., 1964), aff'd *per curiam*, 331 F. 2d 1020 (D.C. Cir., 1964), cert. den., 377 U.S. 918 (1964).

Very generally, that part of Award 282 relating to the use of firemen (which concerned the BLF&E and the BLE) modified the carriers' existing rules so as to permit the elimination of up to 90% of the firemen's positions in freight and yard service, subject to certain protective provisions for existing employees; firemen with more than 10 years seniority were to continue to receive engine-service employment, while firemen with lesser seniority could be offered comparable jobs or separated from employment upon the payment of a generous separation allowance. The Award also contained provisions modifying the carriers' existing rules governing train crew consist, but they directly concerned the other three unions.

2. *Expiration of the Award.* Section 4 of P.L. 88-108 provided that the Award "shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." Award 282 provided for a two-year period.

Under the Railway Labor Act, however, the rates of pay, rules or working conditions established by an agreement or an arbitration award do not cease to apply upon the termination date specified in the agreement or award, but continue to apply until changed pursuant to the "major" dispute procedures of the Act. *Railroad Trainmen* v. *Akron & Barberton Belt R.R. Co.*, — F. 2d —, 55 CCH Labor Cases ¶ 11,912 (p. 19,002) (D.C. Cir., 1967); *Manning*

v. *American Airlines, Inc.*, 329 F. 2d 32, 34 (2d Cir., 1964). The purpose and effect of a termination clause is to preclude one party from requiring the other to bargain upon proposed changes in the rates of pay, rules or working conditions, under the "major" dispute procedures of the Act, prior to the termination date. *Flight Engineers' Inter. Ass'n* v. *American Airlines, Inc.*, 303 F. 2d 5 (5th Cir., 1962), appeal dismissed by stipulation, 314 F. 2d 500 (5th Cir., 1963); *Capitol Airways, Inc.* v. *Air Line Pilots Ass'n*, 41 CCH Labor Cases ¶ 16,739 (M.D. Tenn., 1961); see *Rutland Railway Corp.* v. *Brotherhood of Locomotive Eng.*, 307 F. 2d 21, 36 (2d Cir., 1962), cert. den., 372 U.S. 954 (1963).

Consequently, the railroads understood the Congress to have intended, by rejecting the approach proposed in the President's bill and adopting the "time-tested provisions of the Railway Labor Act," that their rules as modified by or pursuant to the Award should continue to apply after the expiration of the Award until changed in accordance with the Railway Labor Act, and that Section 6 notices proposing changes in such rules could not properly be served until after the expiration of the Award.[6] The BLF&E and the other unions, except the BLE, contended that the rules in effect prior to the Award automatically were restored upon the expiration of the Award. The BLF&E, the BRT and the ORC&B also served Section 6 notices prior to the expiration of the Award proposing changes in the carriers' rules as modified by the Award.

The two-year period of the Award expired on January 25, 1966 insofar as the crew-consist provisions of the Award were concerned, but did not expire until March 31, 1966

[6] Representative Harris, the Chairman of the House Interstate and Foreign Commerce Committee and floor manager of the bill, had a similar understanding, stating that "the issues go back under the regular established procedure of collective bargaining" following the expiration of the Award, 109 Cong. Rec. 15279. See, also, id. at 15281.

insofar as the firemen's provisions were concerned. Thus, while most of the issues raised by this controversy over the effect of the expiration of the Award were similar with respect to both aspects of the Award, they arose first in a suit filed by the railroads against the BRT, SUNA, and ORC&B. That proceeding came before Judge Holtzoff as the Chief Judge of the United States District Court for the District of Columbia had assigned to him all litigation in that Court involving P.L. 88-108 and the Award. While ruling against the railroads on some issues, Judge Holtzoff substantially agreed with the contentions that their rules as modified by the Award continued to apply after the expiration of the Award until changed in accordance with the Railway Labor Act and that the Section 6 notices served during the period of the Award were premature. *Akron & Barberton Belt R. Co.* v. *Brotherhood of R. Trainmen*, 250 F. Supp. 691, 252 F. Supp. 207, 254 F. Supp. 306; *Akron & Barberton Belt R. Co.* v. *Order of Ry. C. & B.*, 253 F. Supp. 538. Those rulings were followed by Judge Holtzoff in the subsequent proceeding involving the petitioner BLF&E concerning the effect of the expiration of the Award upon the firemen's provisions of the Award. *Bangor & Aroostook R. Co.* v. *Brotherhood of Loc. E. & E.*, 253 F. Supp. 682.

Cross appeals from all these decisions by Judge Holtzoff were filed by the railroads and the unions, and all such appeals were heard and decided together by the Court of Appeals. *Railroad Trainmen* v. *Akron & Barberton Belt R. Co.*, — F. 2d —, 55 CCH Labor Cases ¶ 11,912 (May 12, 1967), supplemental opinion, — F. 2d —, 56 CCH Labor Cases ¶ 12,095 (July 31, 1967). With respect to the principal issues, the Court of Appeals substantially agreed with the railroads' contention that their rules as modified by the Award continued to apply after the expiration of the Award

until changed in accordance with the Railway Labor Act, but held that the unions during the period of the Award could serve and require bargaining upon Section 6 notices proposing changes in such rules effective after the expiration of the Award.

The Section 6 notices served by the BLF&E, on or about November 15, 1965, were divided into three parts identified as "Notice No. 1," "Notice No. 2," and "Notice No. 3." In general, Notice No. 1 proposed to require the use of firemen on almost all trains immediately upon the expiration of the Award; Notice No. 2 proposed to require the railroads to compensate firemen or former firemen for all losses they may have incurred as a result of the application of the Award and otherwise retroactively to nullify all that had been accomplished under the Award insofar as possible; and Notice No. 3 proposed to establish an apprentice training program for locomotive engineers. Judge Holtzoff held both Notice No. 1 and Notice No. 2 to be invalid as well as premature, and the Court of Appeals agreed as to Notice No. 2 but disagreed as to Notice No. 1. The validity of Notice No. 3 (which involves a jurisdictional conflict between the BLF&E and the BLE) was not passed upon by either court, pursuant to a stipulation of the parties reserving that issue for other proceedings.[7]

3. *Petitioners' Contempt.* On March 28, 1966 the District Court entered a temporary restraining order (JA 37-43) prohibiting the BLF&E, its officers, etc. from striking the railroads "over any dispute as to the agreements, rules, regulations, interpretations, or practices to be applied by . . . them upon the expiration of the period during which the Award by Arbitration Board No. 282 shall continue in force . . . ." That order also provided that it would expire

[7] That issue is now pending in *Brotherhood of Locomotive Engineers v. National Mediation Board, et al.*, Civil Action No. 2060-66 (D.D.C.).

on April 5, 1966 unless further extended, and scheduled a hearing on the railroads' motion for a preliminary injunction for April 4, 1966. The order was granted, after counsel for both sides were heard (JA 32-36), upon the basis of an affidavit (JA 15-31) which set forth, among other things, statements by petitioner Gilbert and by other officials of the BLF&E (JA 25-29) threatening a strike if the railroads did not upon the expiration of the Award restore the rules in effect prior to the Award, and that (JA 30-31) the "major" dispute procedure of the Railway Labor Act had not been exhausted with respect to the Section 6 notices served by the BLF&E.

At or about 12:01 a.m. on March 31, 1966, immediately upon the expiration of the Award, the BLF&E struck some 12 of the railroads—the respondents here. To avoid any possible question about the applicability of the March 28 order to that strike, respondents moved for a supplemental order which was entered, after a hearing (JA 59-76), on March 31, 1966. That supplemental order (JA 76-78) specifically required the BLF&E, its officers, etc. to "cease the said strikes and picketing that are now taking place," and included a finding that affidavits filed by respondents "sufficiently demonstrate that the said strikes may relate to a dispute as to the agreements, rules, regulations, interpretations or practices to be applied by the said railroads upon the expiration of" the Award. In addition to relating the commencement of the strike, the affidavits (JA 45-58) also set forth statements by various local officers and members of the BLF&E that the strike was over the refusal of the railroads to do away with Award 282 and use firemen on all trains.[8]

[8] As the affidavits disclosed, some local officials of the BLF&E claimed that the strike was over its Section 6 notices in general or Notice No. 3 in particular, but noted that this was belied by the timing of the strike and by the fact that the BLF&E had not invoked mediation or otherwise

Despite this order specifically restraining continuation of the strike, the strike continued. After an evidentiary hearing upon a Rule to Show Cause (JA 80-137), an order was entered on April 2, 1967 (JA 138-140) adjudging petitioners "guilty of contempt . . . in failing and refusing to comply with [the District] Court's order of March 28, 1966, as supplemented by its order of March 31, 1966," and ordering "that said BLF&E be fined in the sum of $25,000 and H. E. Gilbert be fined in the sum of $2500 if the said contempts have not been terminated by 12 o'clock noon, on April 3, 1966." Similar fines were imposed for each additional day after April 3 throughout which the strike continued.[9] Although counsel for both petitioners and respondents informed the Court that it would be possible for the firemen to return to work by 11 or 12 o'clock on the night of April 2d (JA 136), the Court thus allowed petitioners until noon the next day in which to terminate the strike without incurring the fines imposed, and the amounts of the fines were substantially less than respondents had requested ($500,000 per day as to the BLF&E and $10,000 per day as to Mr. Gilbert). When the strike continued beyond noon of April 3d, respondents obtained a Rule to Show Cause why the amount of the fines should not be increased for any additional days that the strike continued,

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exhausted the procedures of the Railway Labor Act so as to be in a position to strike over those notices. The Court of Appeals stated that the refusal of the railroads to bargain over the notices, even if valid and not premature, merely entitled the union to seek mediation by the National Mediation Board. *Railroad Trainmen* v. *Akron & Barberton Belt R.R. Co.*, *supra*, 55 CCH Labor Cases at p. 19,005. See *e.g.*, *Locomotive Engineers* v. *B. & O. R. Co.*, *supra*.

[9] Although the order in terms imposed such additional fines for each day "or portion thereof" that the strike continued after noon on April 3d (JA 140), Judge Holtzoff subsequently explained (JA 190) that he had intended to impose additional fines only for each additional full day, and that he would adhere to that intention even though counsel for petitioners had not called his attention to the matter at the time the order was signed.

but that Rule was vacated on April 4th after the strike was terminated (JA 141-149).

On April 29, 1966, respondents moved for an order assessing the fines incurred by petitioners under the civil contempt order of April 2, 1966 by reason of their failure to terminate the strike prior to noon of April 3d, filing affidavits showing that the strike had continued for about 12 hours beyond that deadline (JA 155-189). Petitioners filed a memorandum of law in opposition to the motion, but did not file any opposing affidavits (JA 191-194). Hearings on this motion and another matter had been set for June 17, 1966. On June 9, 1966, however, Judge Holtzoff concluded (JA 199-204) that an evidentiary hearing on the motion was unnecessary as the affidavits showing a continuation of the strike beyond noon of April 3d had not been contradicted by other affidavits and petitioners' argument that they were attempting to negotiate with the railroads the terms upon which the men would return to work did not constitute a legal excuse for not obeying the Court's order. Consequently, he entered an order (JA 206-208) assessing fines in the amount of $25,000 and $2,500, respectively, against the BLF&E and Mr. Gilbert.

The Court of Appeals agreed "that mere attempts to further negotiate terms for a return to work" would not "be a compliance with the orders of the District Court," but found "that it is possible that counsel for [petitioners] was urging a more absolute 'substantial compliance,' or an inability to comply, with the District Court's unconditional order to call off the strike and return to work" (Pet., App. A, at 53). Hence, the Court of Appeals reversed the order assessing the fines and remanded the case for a hearing or trial of that issue, which might have a bearing upon whether part of the fines which had accrued should be remitted even if there was not such compliance or inability to comply as to

constitute a complete defense (Pet., App. A, at 52-54). In all other respects, the contested legal rulings by the District Court were affirmed.

4. *The Motion to Disqualify.* On April 22, 1966, the BLF&E filed a motion under 28 U.S.C. § 144 to disqualify Judge Holtzoff (JA 149-150) together with a supporting affidavit executed by Mr. Gilbert (JA 150-153). The only specifications in that affidavit which were relied upon by petitioners in the Court of Appeals read (JA 152) as follows:

> "7. On information and belief, on April 4, 1966, Judge Holtzoff informed the press that fines had accrued automatically because the union remained on strike for about 12 hours after the deadline. Judge Holtzoff said that fines of $27,500 were now due and payable because the strike did not end by noon Sunday. Said statements to the press were made under the restriction that the press not quote Judge Holtzoff directly, but refer only to a court official or officials as the source of said statements.
>
> "8. On April 6, 1966, when the railroads presented an order to Judge Holtzoff vacating the rule to show cause issued April 3, 1966, to increase the fines, Judge Holtzoff not only asserted that fines were in fact due, but actually prompted the railroads to act to force payment (Tr. 2-3). The railroads have announced they will do so."

The portion of the transcript referred to in the second paragraph quoted above is set out at JA 147-148. When counsel for respondents presented to the Court a proposed order vacating the Rule to Show Cause (see p. 11, *supra*), Judge Holtzoff asked if the order served only to vacate the Rule, commenting that "rights may have accrued, and probably have accrued" under the earlier orders. He continued to

note that the question of fines was not before the Court in any event, since it could not act *sua sponte* but only at the instance of a party.

Judge Holtzoff denied the motion to disqualify because of the legal insufficiency of the supporting affidavit (JA 153-154), and the Court of Appeals affirmed (Pet., App. A., at 42-45).

Argument

The judgment below is not final as the Court of Appeals directed a remand of the case for further hearing. As is noted by Stern & Gressman, *Supreme Court Practice* (3d ed., 1962), at 148: "The Supreme Court will not usually grant certiorari to review a non-final judgment . . ., in the absence of some exceptional reason." We shall show that the court below correctly applied settled legal principles to the particular facts of this case, and that the rulings sought to be reviewed do not conflict with decisions of this Court or of a court of appeals. Consequently, there would not be any adequate ground for granting the petition even if the judgment below were final, and certainly there is no "exceptional reason" which would justify review at this time of the non-final judgment entered by the Court of Appeals.

I

Petitioners Were Not Entitled to A Jury Trial

The Court of Appeals affirmed the action by the trial court in entering its contempt order of April 2, 1966 upon the basis of a trial before the court, rejecting petitioners' contention that they were entitled to a jury trial of the issue as to whether they had contemptuously violated the temporary restraining order as supplemented. In so doing, the Court of Appeals held that the contempt proceedings were civil in nature (Pet., App. A, at 46-47), and that 18 U.S.C.

§ 3692 is inapplicable because (1) it applies only to criminal contempt proceedings (*id.*, at 47-49) and "decisively" (2) it does not apply to contempt proceedings growing out of orders prohibiting violations of the Railway Labor Act (*id.*, at 49-50). Each of these rulings is correct.

1. *The contempt proceedings were civil in nature.* Under the order of April 2, 1966, petitioners were adjudged to be in contempt but the fines imposed were conditioned upon petitioners' failure to purge their contempt by complying with the temporary restraining order prior to noon of the next day. Such a conditional fine, having the purpose of coercing compliance with the court's order, undoubtedly is civil rather than criminal in nature. *E.g., Shillitani* v. *United States*, 384 U.S. 364, 368 (1966); *Penfield Co.* v. *S.E.C.*, 330 U.S. 585, 590 (1947); *United States* v. *Mine Workers*, 330 U.S. 258, 303-305 (1947); *Doyle* v. *London Guarantee Co.*, 204 U.S. 599, 606-607 (1907). Petitioners "conceded, and indeed argued," in the court below "that this was initially a civil contempt proceeding, both in form and in procedure" (Pet., App. A, at 46), but contend that the proceeding was converted to criminal contempt when the trial court subsequently undertook to determine whether the condition specified in its April 2 contempt order had been complied with and, if not, to assess and collect the fines that accrued under that order.

None of the cases cited by petitioners (Pet., at 20-21) either considers or supports such a contention, and it appears to us to be frivolous on its face. Petitioners' contempt was adjudged in the April 2 order and was not and will not be in issue in the subsequent proceeding. Since the trial court was interested in "compelling compliance" with its temporary restraining order rather than in punishment and was reluctant to resort to imprisonment of petitioner

Gilbert for that purpose (JA 133-134); the April 2 order necessarily imposed coercive civil contempt fines which were conditioned upon a failure by petitioners to purge their contempt by terminating the strike within a specified future period. No fines will be assessed or collected if in the further proceeding petitioners demonstrate that they complied with that condition or were unable to do so in accordance with the principles set forth by the Court of Appeals. If any fines are assessed and collected, that will not be because the fines are any less "conditional" than they were when imposed by the April 2 order but because the condition specified in that order has been breached by petitioners. If the mere fact of assessing and collecting conditional coercive civil contempt fines upon breach of the condition suffices to convert the proceeding into one for criminal contempt, as a practical matter there could be no coercive civil contempt fines since they necessarily would be converted into criminal contempt fines before they could be collected. As the above cited cases and many others show, this is not the law.

2. *18 U.S.C. § 3692 is inapplicable.*[10] Section 3692 of the Criminal Code provides for jury trials in "cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute," with certain exceptions. Section 3692 is a codification of former Section 11 of the Norris-LaGuardia Act (44 Stat. 72). This Court held, in *United States* v. *Mine Workers*, 330 U.S. 258, 298 (1947), that former Section 11 applied only to contempts growing out of alleged violations of injunctive orders which are subject to the Norris-LaGuardia Act. This inter-

[10] There is no constitutional right to a jury trial in civil contempt proceedings. *Shillitani* v. *United States*, 384 U.S. 364, 365 (1966).

pretation has uniformly been applied to former Section 11 as codified in 18 U.S.C. §3692,[11] and its application to Section 3692 has not been disputed by petitioners.

In the opinion of the court below, therefore, the "decisive" reason for holding that petitioners are not entitled to a jury trial under Section 3692 is that the Norris-LaGuardia Act "does not apply to an injunction issued to aid in enforcement of the Railway Labor Act" (Pet., App. A, at 49-50). While petitioners do challenge this holding that Norris-LaGuardia does not apply to injunctions requiring compliance with the Railway Labor Act (Pet., at 25-33),[12] this Court has consistently held "that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458

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[11] See, *e.g.*, *Madden* v. *Grain Elevator, Flour & Feed Mill Workers, Etc.*, 334 F. 2d 1014 (7th Cir., 1964); *Schauffler* v. *Local 1291 Intern. Longshoreman's Ass'n*, 189 F. Supp. 737 (E.D. Pa., 1960), rev'd in part on other grounds, 292 F. 2d 182 (3d Cir., 1961); *Mitchell* v. *Barbee Lumber Co.*, 35 F.R.D. 544 (S.D. Miss., 1964).

[12] The main thrust of Petitioners' argument appears to be that the underlying temporary restraining order was invalid because of the Norris-LaGuardia Act. In the *Mine Workers* case, this Court held that "the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction" where a claim had been raised that Norris-LaGuardia deprived the court of jurisdiction to issue injunctive relief (330 U.S., at 290) and, consequently, that criminal contempt sanctions could be imposed for violation of that order even if it should ultimately be held that Norris-LaGuardia deprived the court of jurisdiction (330 U.S., at 289-295). As the court below noted (Pet., App. A, at 54-55), the rationale of that decision supports the view that the alleged invalidity of the underlying temporary restraining order is not a defense to civil *coercive* contempt fines. See, also, *Walker* v. *City of Birmingham*, — U.S. —, 35 Law Week 4584 (1967); *Howat* v. *Kansas*, 258 U.S. 181, 189-190 (1922); *United States* v. *Shipp*, 203 U.S. 563, 572-574 (1906). The petition does not expressly take issue with this application of the *Mine Workers* doctrine. In any event, the above-quoted holding in *Mine Workers* provides a complete answer to petitioners' contention (Pet., at 31-32) that a temporary restraining order cannot be issued to preserve the status quo pending a final determination of the Norris-LaGuardia issue. See pp. 19-20, *infra*.

(1957). See, *e.g., Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33, 42 (1963); *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957); *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 237-240 (1949); *Virginian Ry.* v. *Federation*, 300 U.S. 515, 563 (1937).[18]

With regard to "major" disputes over proposed changes in rates of pay, rules and working conditions the Railway Labor Act requires service of a written notice setting forth such proposed changes (45 U.S.C. § 156), conferences by the parties with respect thereto (45 U.S.C. § 152 Second, 156), submission to mediation by the National Mediation Board if not settled in such conferences (45 U.S.C. §§ 155 First, 156), a proffer of arbitration by the Board if its mediation efforts are unsuccessful (45 U.S.C. § 155 First) and submission to an emergency board for investigation and report if such a board is appointed by the President in his discretion (45 U.S.C. § 160). See, generally, *Elgin J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-728 (1945). Once all those procedures have been exhausted without settling the dispute, the parties may resort to self help, including strikes by the union, without violating the Railway Labor Act, but the parties may not resort to self help without violating the mandates of the Railway Labor Act until they have been exhausted. *E.g., Railway Clerks* v. *B. & O. R. Co.*, 384 U.S. 238, 243-244 (1966); *Locomotive Engrs.* v. *B. & O. R. Co.*, 372 U.S. 284 (1963).

Telegraphers v. *Chicago & N.W. Ry. Co.*, 362 U.S. 330 (1960), and *Trainmen* v. *Toledo P. & W. R. Co.*, 321 U.S. 50

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[18] The legislative history of Norris-LaGuardia demonstrates that the Act was not intended to apply to injunctive proceedings involving alleged violations of the Railway Labor Act. *Trainmen* v. *Chicago, R. & I. R. Co., supra* at 40-41. For example, in response to an inquiry as to whether the Act would "make it possible for lack of an injunction to tie up railroads," Representative LaGuardia replied that the Railway Labor Act "takes care of the whole labor situation pertaining to railroads" so that they could not "possibly come under this" legislation. 75 Cong. Rec. 5499.

(1944), relied upon by petitioners (Pet., App. A, at 27-31) for the proposition that Norris-LaGuardia does apply where a "major" dispute is involved, involved situations where the "major" dispute procedures of the Railway Labor Act had been exhausted (see 362 U.S., at 349-351; 321 U.S., at 51-52), and the footnote in the *Chicago, R. & I. R. Co.* opinion partially quoted by petitioners (Pet., App. A, at 29) merely cited the *Toledo* case for its holding that Norris-LaGuardia applies in such a situation in the course of holding Norris-LaGuardia inapplicable to an injunction requiring compliance with the mandates of the Railway Labor Act.[14] But where the "major" dispute procedures have not been exhausted, compliance with those procedures may be required, *Elgin, J. & E.R. Co.* v. *Burley, supra* at 725, and the courts consistently have held that Norris-LaGuardia does not deprive them of jurisdiction to enjoin a strike over a "major" dispute prior to the exhaustion of such procedures. *Norfolk & P.B.L. R. Co.* v. *Brotherhood of Rail. Train.*, 248 F. 2d 34, 45-46 (4th Cir., 1957), cert. den., 355 U.S. 914 (1955); *Pennsylvania Railroad Co.* v. *Transport Wkrs. Union*, 202 F. Supp. 134, 137 (E.D. Pa., 1962); *Western Air Lines* v. *Flight Engineers Internat'l Ass'n*, 194 F. Supp. 908, 910-911 (S.D. Cal., 1961); *Pennsyl-*

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[14] Of the railroad cases cited in footnote 22, page 28 of the petition, the injunction sought in the *Butte* case did not seek to require utilization of Railway Labor Act procedures, 208 F. 2d, at 60; the *Chicago & N.W.* case held Norris-LaGuardia inapplicable and enjoined a strike over a "minor" dispute, 354 F. 2d, at 792-796; the *Missouri-Illinois* case involved a "major" dispute in which the procedures of the Railway Labor Act had been exhausted, 322 F. 2d, at 798, as did the *Pullman Company* case, 316 F. 2d, at 559, 563; and the *Rutland* case involved a "minor" dispute, 307 F. 2d, at 30-34. The *Butte* (p. 58), *Missouri-Illinois* (p. 796), *Pullman Company* (p. 563) and *Rutland* (pp. 31-32) cases recognized, *in dicta*, that the courts may compel compliance with the "major" dispute procedures of the Railway Labor Act when those procedures have not been exhausted with respect to a "major" dispute. The case cited in footnote 23 on page 29 of the petition involved a "major" dispute in which the procedures of the Act had been exhausted, 357 F. 2d, at 153.

vania Railroad Co. v. *Transport Workers Union*, 191 F. Supp. 915, 921 (E.D. Pa., 1960), aff'd., 280 F.2d 343 (3d Cir., 1960); *Chicago, Rock Island & P. R. Co.* v. *Switchmen's Union*, 187 F. Supp. 581, 584 (W.D. N.Y., 1960), rev'd on other grounds, 292 F.2d 61 (2d Cir., 1961), cert. den., 370 U.S. 936 (1962); *American Airlines, Inc.* v. *Air Lines Pilots Ass'n Inter.*, 169 F. Supp. 777, 788-789 (S.D.N.Y., 1958).[15]

The temporary restraining order in the instant case was issued and supplemented upon the basis of affidavits showing that the BLF&E threatened to and did strike the railroads because of their refusal, upon the expiration of Award 282, to reinstate their prior rules governing the use of firemen and that the BLF&E had not exhausted the "major" dispute procedures of the Railway Labor Act with respect to Section 6 notices proposing such action. While that order was intended to preserve the status quo pending hearing and determination of the issues thus presented, including the union's claim that Norris-LaGuardia deprived the court of jurisdiction to issue injunctive relief, this Court established in the *Mine Workers* case that Norris-LaGuardia does not apply to prevent the issuance of such a "restraining order for the purpose of preserving existing conditions pending a decision upon its own juris-

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[15] Many other cases have stated in *dicta* that Norris-LaGuardia is inapplicable in such circumstances. *E.g., Eastern Air Lines, Inc.* v. *Flight Engineers International Ass'n*, 340 F. 2d 104, 106 (5th Cir., 1965), cert. den., 382 U.S. 811 (1965); *Pan American World Air.* v. *Flight Eng. Inter. Assoc.*, 306 F. 2d 840, 846 (2d Cir., 1962); *Chicago River & Indiana R. Co.* v. *Brotherhood of Rail. T.*, 229 F. 2d 926, 930-931 (7th Cir., 1956), aff'd, 353 U.S. 30 (1957). And, the courts have held that in the converse situation, where a carrier has not exhausted the "major" dispute procedures of the Railway Labor Act, Norris-LaGuardia does not bar an injunction against the carrier. *E.g., Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen, Etc.*, 337 F. 2d 127, 132-133 (D.C. Cir., 1964); *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32 (2d Cir., 1964), cert. den., 379 U.S. 817 (1964); *Railroad Yardmasters* v. *Pennsylvania Railroad Co.*, 224 F. 2d 226, 228 (3d Cir., 1955).

diction." See fn. 12, p. 16, *supra*. Thus, the courts frequently have issued temporary restraining orders and preliminary injunctions prohibiting strikes or other acts allegedly in violation of the Railway Labor Act, pending a final determination of those allegations. See, *e.g.*, *Locomotive Engineers* v. *M.-K.-T. Co.*, 363 U.S. 528 (1960); *Graham* v. *Brotherhood of Firemen, supra;* and the cases cited on p. 19, *supra*.

Consequently, we submit that the court below was clearly correct in holding the Norris-LaGuardia Act to be inapplicable and, concomitantly, in holding that 18 U.S.C. § 3692 did not apply to the contempt proceeding.

The court below also held that a jury trial was not required by 18 U.S.C. § 3692 because that statute applies only to criminal contempt proceedings, as is indicated by its inclusion in the criminal code. In addition to being supported by the authorities discussed in the opinion below (Pet., App. A, at 48-49), that alternative holding also accords with an alternative holding in *Philadelphia M. Tr. Ass'n* v. *International Long. Ass'n. L. 1291*, 368 F.2d 932, 934 (3d Cir., 1966), cert. granted, No. 78, O.T. 1967, which we discuss below. We are not aware of any decisions to the contrary.

3. *The grant of certiorari in No. 78 is not an adequate reason for granting certiorari in this case.* Petitioners assert (Pet., at 18-21) that certiorari should be granted to review the jury trial issues in this case because those issues are already before the Court in No. 78, O.T. 1967. Even if the issues in the two cases were the same in all important respects, that would not necessarily constitute an adequate reason for granting certiorari in this case, particularly since the Court of Appeals remanded this case for a further hearing and its decision is not final. In any event, there are substantial differences betwen the two cases and a reversal

of the decision below in No. 78 would not require a reversal of the decision below in this case.

We are informed by the Clerk's Office that no response was filed to the petition for writ of certiorari in No. 78. The facts asserted in the petition (pp. 4-5) generally are as follows: A dispute between a union and an employer concerning the interpretation of a provision in their collective-bargaining agreement was submitted to arbitration, and the trial court entered an order enforcing the arbitration award. Subsequently, when a similar dispute arose between the union and another employer, the members of the union commenced a "wildcat" strike despite efforts, conceded to have been "sincere," by the officers of the union both to prevent and then to terminate the strike. The employers reported this fact orally to the trial court, and the union was adjudged to be in contempt of the order enforcing the arbitration award, by reason of the "mass action" of its members, without any pleadings or other papers being filed and without a jury trial being had. The opinion of the court of appeals (368 F.2d, at 933) shows that a fine in the amount of $100,000 per day, effective as of 2:00 p.m. of the day on which the contempt order was entered, was imposed, and this was held to be a coercive civil contempt sanction—a holding that is not questioned in the petition.

From the face of the petition in No. 78, the petitioners appear to have relied most heavily upon the alleged procedural irregularities (pp. 6-8) and upon the holding that the union was responsible for the "mass action" of its members, even though contrary to the orders of the union leaders (pp. 8-11), as grounds for the grant of certiorari. The latter holding was claimed to involve a direct conflict with a decision by another court of appeals. None of those issues, and nothing like them, is involved here. The only question presented in that petition which is also presented

in the petition here concerns the applicability of 18 U.S.C. § 3692, and that was the last ground argued by the petition in No. 78 (pp. 13-17).

In No. 78, the Third Circuit held Section 3692 to be inapplicable because the order enforcing the arbitration award was not "an injunction or a restraining order" to which Norris-LaGuardia applied, but "an order under Section 301 of the Labor Management Relations Act" which did not "involve or grow out of a labor dispute" within the meaning of the Norris-LaGuardia Act. 368 F.2d, at 934. The Third Circuit also held, alternatively, that Section 3692 applies only to criminal contempt proceedings and thus did not apply to the civil contempt proceeding under review. *Ibid.*

While the Norris-LaGuardia issue thus presented in No. 78 bears a superficial resemblance to the Norris-LaGuardia issue here, in fact the two cases involve separate and distinct issues in this regard. Neither petitioners in No. 78 (see p. 16) nor petitioners here attack the settled rule that Section 3692, which originated in Norris-LaGuardia, applies only to contempt proceedings arising out of injunctive orders governed by Norris-LaGuardia. See pp. 12-16, *supra*. Thus, the true issue in No. 78 is whether Norris-LaGuardia applies to orders enforcing an arbitration award under Section 301 of the Labor Management Relations Act, while the true issue here is whether Norris-LaGuardia applies to orders requiring compliance with the mandates of the Railway Labor Act. There is no reason to believe that any ruling by this Court concerning the applicability of Norris-LaGuardia to orders enforcing arbitration awards under Section 301 will in any way involve or affect the established rule that Norris-LaGuardia does not apply to orders requiring compliance with the mandates of the Railway Labor Act. See pp. 16-19, *supra*.

It is true that both the Third Circuit in No. 78 and the District of Columbia Circuit in this case held that Section 3692 does not apply to civil contempt proceedings, and those holdings present identical issues insofar as we can ascertain. But other and different issues are involved in both cases and, as we have noted, the holdings in question merely provided an alternative basis for affirming the denial of a jury trial as both appellate courts primarily relied upon the inapplicability of the Norris-LaGuardia Act to reach that result. Hence, there is no assurance that this Court in No. 78 will reach the issue as to whether Section 3692 is limited to criminal contempt, and a decision of that issue would not necessarily affect the result in this case. If this Court should rule in No. 78 that Section 3692 does not apply to any civil contempt proceeding, such a ruling would merely confirm the correctness of the decision below in this case, while a ruling that Section 3692 may apply to civil contempt proceedings would not upset the denial of the jury trial in this case as that denial still would be adequately supported by reason of the inapplicability of Norris-LaGuardia (including Section 3692 which originated in Norris-LaGuardia) to orders requiring compliance with the mandates of the Railway Labor Act.

We do not believe, therefore, that the pendency of No. 78 is an adequate reason for granting certiorari in this case, and there is no other substantial reason for reviewing the decision below insofar as the jury trial and Norris-LaGuardia issues are concerned. The claimed "nullification" of Norris-LaGuardia (Pet., at 25-33) amounts to no more, as we have shown, than an application to the particular facts of this case of the long-established principle that Norris-LaGuardia does not apply to injunctions requiring compliance with the mandates of the Railway Labor Act, including injunctions prohibiting strikes over "major" disputes

prior to the exhausting of the procedures required by that Act to be followed with respect to such disputes. The power of a district court to enter a temporary restraining order or preliminary injunction preserving the status quo by restraining a strike pending final determination of a claim that Norris-LaGuardia deprives the court of jurisdiction is established by the decision of this Court in the *Mine Workers* case, and the conflict of decisions asserted by petitioners does not exist.

II

The Motion to Disqualify Was Properly Denied

The court below affirmed the denial of the motion by the BLF&E, pursuant to 28 U.S.C. § 144, to require Judge Holtzoff to disqualify himself on the ground that the motion and accompanying affidavit "are legally insufficient to have required the judge to recuse himself in this case" (Pet., App. A, at 44). The weakness of petitioners' argument that this holding was erroneous and presents an important question (Pet., at 22-24) is indicated by the fact that the only case cited by petitioners which in any way involved Section 144 is *Berger* v. *United States*, 255 U.S. 22 (1921); and petitioners do not even purport to claim that the court below, which expressly referred to the *Berger* case, misapplied that decision. All that is involved in this issue is the application of established legal principles, none of which have been questioned by petitioners, to the facts of the particular case. Hence, no "important question in the administration of federal justice" is presented, even if there were reason to believe that some other court might reach a different result in applying the same legal principles to the particular facts.

In any event, we believe that the careful opinion below adequately demonstrates the correctness of the decision

reached (Pet., App. A, at 42-45), and we see no need to repeat what is stated therein. We note, however, the recent holding by this Court that the "alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966). Neither of the specifications relied upon by petitioners (p. 12, *supra*) alleges an "extrajudicial source" for the claimed bias and prejudice or alleges that the statements attributed to Judge Holtzoff were not based on what he "learned from his participation in the case."[16]

Respondents also contended below that, even if the motion and affidavit were legally sufficient, they were untimely (see *Faubus* v. *United States*, 254 F.2d 797 (8th Cir., 1958)) and were defective in that they did not include a certificate of the good faith of counsel (see *In re Union Leader Corp.*, 292 F.2d 381, 385 (1st Cir., 1961)), and that petitioners' waiver of the disqualification issue with respect to another order by Judge Holtzoff in the same case also waived that issue with respect to the contempt order. While the court below did not find it necessary to pass upon those contentions, it did emphasize "that proper certification is a vital and significant requirement to prevent abuse of Sec. 144" (Pet., App. A, at 45), and we believe that each of them provides an additional ground in support of the decision below.

[16] In essence, petitioners complain of alleged assertions by Judge Holtzoff, on April 4 and 6, that the fines were due because the strikes had continued beyond noon of April 3d. That fact was brought to his attention by a motion and affidavit submitted by respondents on April 3 (JA 141-147).

Conclusion

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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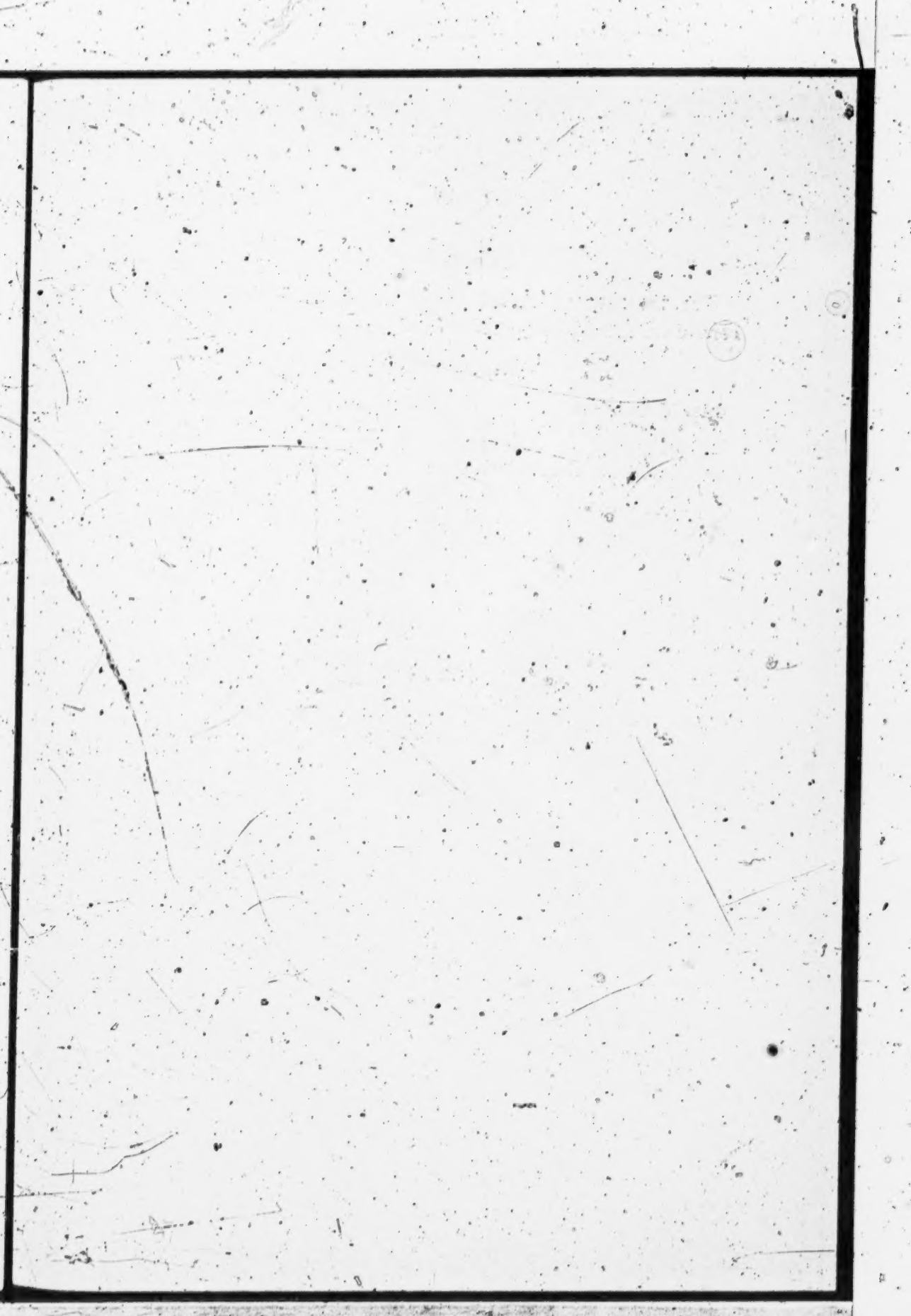

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL. *v.* BANGOR & AROOSTOOK RAILROAD CO. ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 353. Decided December 11, 1967.

PER CURIAM.

This case is a consequence of a dispute with respect to the scope of an arbitration award governing the manning of trains and engines in freight service. The union took the position that the award had no effect after 12:01 a. m., March 31, 1966. On March 28, the District Court for the District of Columbia issued a temporary restraining order forbidding a strike. On March 31 the union struck against a number of railroads. The District Court entered contempt orders, imposing substantial fines for alleged violation of its restraining order. The Court of Appeals ruled on various legal issues presented to it but remanded to the District Court to consider whether there had in fact been a contempt, and also, if there was a contempt, whether it was "of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey."

Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied. See *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 257–258 (1916).

MR. JUSTICE BLACK would grant the petition and set the case for argument.